No. 1929

In The

Supreme Court of the United States

October Term, 1982

VICTOR M. EISENBEISS, JR.,

Petitioner,

vs.

JAMES HUBERT JARRELL, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

VAN S. POWERS
THOMAS F. KENNEDY
CHARLES J. GODDARD
Attorneys for Petitioner
4344 Farragut Street
Hyattsville, Maryland 20781
(301) 277-3311

8529

Lits Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587 MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 221-0008

A. QUESTIONS PRESENTED FOR REVIEW.

1. WAS PETITIONER DENIED DUE PROCESS OF LAW, GUARANTEED UNDER THE FOURTEENTH AMMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, AND HIS RIGHTS AND PROPERTY BY WAY OF CERTAIN CAUSES OF ACTION THEREBY ARBITRARILY AND SUMMARILY EXTINGUISHED AND TAKEN BY THE CONDUCT OF COURT WHICH, ACTING AS FINDER OF FACT AND DECISION MAKER, DENIED PETITIONER AN IMPARTIAL HEARING AND FOUND AGAINST PETITIONER BASED UPON THE COURT'S STATED, PRE-EXISTING BIAS AND PARTIALITY WHICH WAS UNKNOWN TO PETITIONER UNTIL THE CONCLUSION OF PROCEEDINGS WHICH TERMINATED HIS RIGHTS?

2. WAS PETITIONER DENIED EQUAL PROTECTION OF THE LAWS, GUARANTEED UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, AND HIS RIGHTS AND PROPERTY BY WAY OF CERTAIN CAUSES OF ACTION THEREBY ARBITRARILY AND SUMMARILY EXTINGUISHED AND TAKEN, BY THE FAILURE OF THE COURT TO RECUSE ITSELF FROM ACTING AS FINDER OF FACT AND DECISION MAKER BASED UPON ITS KNOWN BIAS AND PARTIALITY CONCERNING CERTAIN WITNESSES?

3. WAS PETITIONER DENIED DUE PROCESS OF LAW, GUARANTEED UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION, AND HIS RIGHTS AND PROPERTY BY WAY OF CERTAIN CAUSES OF ACTION THEREBY ARBITRARILY AND SUMMARILY EXTINGUISHED AND TAKEN, WHEN THE ENFORCEMENT OF AN ALLEGED SETTLEMENT AGREEMENT ON MOTION BY A PARTY WAS GRANTED BY THE COURT, DESPITE THE DEMAND OF, AND PETITIONER'S RIGHT OF TRIAL BY JURY OF ALL ISSUES OF FACT UNDER ARTICLE 23 OF MARYLAND'S DECLARATION OF RIGHTS?

4. WAS PETITIONER DENIED EQUAL PROTECTION OF THE LAWS, GUARANTEED UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION, AND HIS RIGHTS AND PROPERTY BY WAY OF CERTAIN CAUSES OF ACTION THEREBY ARBITRARILY AND SUMMARILY EXTINGUISHED AND TAKEN, WHEN THE COURT, WITHOUT STATUTORY OR OTHER AUTHORITY OR RULE OF PROCEDURE, MERGED LAW AND EQUITY AND ENTERED AN ORDER DISPOSITIVE OF PETITIONER'S RIGHTS AND PROPERTY UPON A PARTY'S MOTION WHICH NEITHER CONFORMED WITH NOR WAS AUTHORIZED UNDER MARYLAND RULES OF PROCEDURE?

B. LIST OF ALL PARTIES TO THE PROCEEDING

VICTOR M. EISENBEISS, JR.
Petitioner, Plaintiff-Appellant

JAMES HUBERT JARRELL
Respondent, Defendant-Appellee

AVIS RENT-A-CAR SYSTEM, INC.
Respondent, Defendant-Appellee

Francis X. Quinn, Esquire
25 Wood Lane
Rockville, Maryland 20850
301 762-3303

Attorney for Appellees/Respondents

William N. Zifchak, Esquire
P.O. Box 550
Upper Marlboro, Maryland 20772

Attorney for Defendants (Below)

Henry E. Weil, Esquire
One Central Plaza, #1009
11300 Rockville Pike
Rockville, Maryland 20852
301 656-0700

Former Attorney for Petitioner

C.1. TABLE OF CONTENTS:

C.2. TABLE OF AUTHORITIES:

(i) Authorities Relied Upon In Petition:

Constitutional Provisions:

Statutes:

Rules:

D. OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

In the Court of Appeals of Maryland,* Victor M. Eisenbeiss, Jr., Appellant v. James Hubert Jarrell, et al., Appellees, September Term, 1982, Petition Docket No. 482

*Order denying Petition for Writ of Certiorari, dated February 3, 1983, having no written opinion.

In the Court of Special Appeals of Maryland,** Victor M. Eisenbeiss, Jr., Appellant, v. James Hubert Jarrell, et al., Appellees, September Term, 1982 No. 176

**Opinion and Order, affirming judgment, dated November 4, 1982.

In the Circuit Court for Prince George's County, Maryland,*** Victor M. Eisenbeiss, Jr., Plaintiff v. James Hubert Jarrell, et al., Defendants, Law No. 78,192

***Judgment appealed from dated December 24, 1981, filed January 4, 1982, subsequent motions hearing on February 8, 1982.

E. Jurisdiction

1. Petitioner seeks review of the Order of the Circuit Court for Prince George's County, Maryland, dated December 24, 1981, filed January 4, 1982, which granted a Motion to Enforce Settlement and forever terminated petitioners rights and causes of action.

2. The Order of Court filed January 4, 1982 was unaltered by subsequent motions to reconsider, revise, strike and stay which were, without hearing or argument, denied on February 8, 1982.

3. The Court of Special Appeals of Maryland, in No. 176, September Term, 1982, denied an appeal of the Order of Court on November 4, 1982 without addressing issues raised.

4. The Court of Appeals of Maryland, in Petition Docket No. 482, September Term,

1982, denied petition for writ of certiorari without opinion on February 3, 1982.

5. The Supreme Court is conferred jurisdiction to review the final judgment and Order of the Circuit Court for Prince George's County, filed January 4, 1982, by writ of certiorari under provisions of the United States Code and under Article III, Section 2 of the Constitution of the United States which extends the judicial power "...to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treatises made, or which shall be made under their Authority;...".

F. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Constitutional Provisions:

* Amendment XIV, Section 1, Constitution of the United States

* Amendment VII, Constitution of the United States

* Amendment IV, Section 18, Constitution of Maryland

* Amendment 23, Maryland Declaration of Rights

Statutes:

* Courts and Judicial Proceedings, Section 1-201(a)

* Maryland Declaratory Judgment Act, Courts and Judicial Proceedings Article, Sections 3-401 et seq.; 3-402; 3-403; 3-406

Rules:

Rule 12, Federal Rules of Civil Procedure

Maryland Rules of Procedure
320, 321, 322, 323, 342*, 346, 406, 420, 422, 527, 532, 535, 552*, 563*, 567, 572, 610*, 625, 871, 1071, 1231, Canon of Judicial Ethics, XIII*, Rules of Judicial Ethics, Rule 13* and 14

* Pertinent text set forth in Appendix (v)

G. STATEMENT OF THE CASE

The petitioner, Victor M. Eisenbeiss, as plaintiff represented by counsel filed a declaration, jury trial prayer, and interrogatories, in the Circuit Court for Prince George's County, Maryland, on October 31, 1979. The causes of action arose from a motor vehicle collision which occurred on November 4, 1977.

On December 18, 1979, counsel for both defendants, James H. Jarrell and Avis Rent-A-Car System, Inc., filed general issue pleas, a denial of ownership of the motor vehicle, and a request for a jury trial.

Discovery proceeded in the litigation and in January and February, 1981, pre-trial and settlement conferences were conducted, however, the matter was not settled so jury trial was scheduled for

February 23, 1981. On February 23, 1981, the case was not reached for trial and the jury trial was reset for March 1, 1982.

On August 31, 1981, the attorney for defendants filed a Motion to Enforce Settlement which came on for hearing in open court in the Circuit Court for Prince George's County, Maryland on December 17, 1981.

At the conclusion of the hearing on defendants' Motion to Enforce Settlement, the judge, as trier of fact, compromised his finding of fact based upon his stated professional and personal knowledge of certain witnesses and stated on the record:

> "...I think it's unfortunate that plaintiff in this case has to have it decided by a judge... that is in an equal standing with the people that...testify in this ...but what the plaintiff is asking me to do is to disregard the testimony of people with whom I know their reputation in the community. I have worked with

> <u>these people</u> on a professional basis. These people still appear before me...and he [plaintiff] is asking me not to accept their testimony, because it is, in fact, contrary to what he says the situation is..." (underline added), (see Appendix (i)).

As a result of the hearing on the Motion to Enforce Settlement, the judge signed an Order on December 24, 1981, filed January 4, 1982, which granted defendants' Motion, and thus, terminated plaintiff's trial rights forever on the underlying causes of action, despite plaintiff's demand for a jury trial.

In an attempt to point out to the lower court what was believed to be obvious error in receiving defendants' Motion, hearing defendants' Motion, and ruling on defendants' Motion with bias and predisposition, the plaintiff obtained new counsel who, on January 21, 1982,

filed a Motion for Reconsideration; Motion to Strike Order of Court of December 24, 1981; Motion to Revise Under Maryland Rule 625; Motion to Stay the Effect of Order of Court of December 24, 1981; and Order of Appeal together with certain affidavits, related points and authorities proposed orders and certificates of service and request for hearing. The defendants filed opposition to these motions.

All the then pending post-hearing motions came on for hearing on February 8, 1982, before the same judge and, despite a request by plaintiff's counsel that another judge consider the matters, after opening remarks by plaintiff's counsel and without the taking of any evidence or oral argument, the judge denied all pending motions thereby preserving the ruling and Order of Court which granted the defendants'

Motion to Enforce Settlement.

Subsequently, plaintiff took an appeal to the Court of Special Appeals of Maryland (No. 176, September Term, 1982) based upon the following issues:

1. The enforcement of an alleged settlement agreement on motion by a party to a civil suit, when there was no settlement agreement and the non-moving party affirmatively stated that his attorney did not have express authority to compromise the claim violated Article 23 of Maryland's Declaration of Rights which guarantees that "the right of trial by jury of all issues of fact in civil proceedings in the several courts of law in this State, where the amount in controversy exceeds the sum of five hundred dollars, shall be inviolably preserved."

2. The enforcement of an alleged

settlement agreement on motion by a party to a civil suit, when there was no settlement agreement and the non-moving party affirmatively stated that his attorney did not have express authority to compromise the claim was improper because it did not conform with the requirements of the Maryland Rules of Procedure.

3. A Motion to Enforce Settlement is not an authorized procedure under the Maryland Rules of Procedure, or under Maryland statutory or case law.

4. There was error in the lower court when the trier of facts, sitting at a Motion to Enforce Settlement Hearing, ruled, based in part on the trier's prior knowledge of or contact with witnesses who testified at the Motion to Enforce Settlement proceeding.

5. The lower court, under Canon 13

of Rule 1231, had a duty or obligation to recuse itself from ruling on the Motion to Enforce Settlement, when the lower court expressed what purported to be an apparent conflict with Rule 1231, Canon 13.

6. The trial judge made a finding of fact which was dispositive of plaintiff's rights on the underlying tort, and in so doing the trial judge was bound to follow Rule 1231, Canon 13 as a trial rule, for the purposes of receiving evidence (testimony) and making rulings on that evidence.

7. Certain affidavits contained information important to the events surrounding the Motion to Enforce Settlement Hearing were dispositive or material to the fact finding process of the lower court with respect to the ruling by the lower court on the Motion.

The Court of Special Appeals of Maryland, on November 4, 1982, denied the appeal made by plaintiff and rendered an eleven (11) page opinion which did not address the issues concerning form of propriety of such a motion, right to jury trial and right to a fair and impartial hearing.

Thereafter, plaintiff petitioned for a writ of certiorari to the Court of Appeals of Maryland (Petition Docket No. 482, September Term, 1982) which petition was denied by the Court of Appeals of Maryland by Order dated February 3, 1983.

H. STAGE IN PROCEEDINGS AT WHICH FEDERAL QUESTIONS WERE RAISED

As described within Section G. Statement of the Case, immediately after the Order of the Circuit Court for Prince George's County, Maryland was filed on January 4, 1982, the petitioner obtained new counsel who, before the Order became a final Order (on February 4, 1982), filed on January 21, 1982 a Motion for Reconsideration, Motion to Strike Order of Court, Motion to Revise, Motion to Stay the Effect of Order of Court, and Order of Appeal together with certain affidavits, related points and authorities and proposed orders, which raised the issues of the impropriety of the Motion; the denial of a fair and impartial hearing; and petitioners right to jury trial on all issues. These motions of petitioner were summarily

dismissed by the lower court on February 8, 1982, by the same judge despite the request of petitioner's new counsel that another judge consider the pending matters, particularly in view of the allegations and evidence of partiality on the part of the judge.

Upon the denial of the motions of petitioner, appeal was taken to the Court of Special Appeals as described within section G. Statement of the Case, at which point the issues raised at the trial court level were delineated and argued by way of exchange of briefs and the limited oral argument permitted by the Court of Special Appeals. The Court of Special Appeals denied the appeal and failed to address the issues in its written opinion raised by petitioner, then appellant, in appellant's brief and reply brief.

I. ARGUMENT FOR THE ALLOWANCE OF WRIT

In the instant case, petitioner is pursuing certain rights and causes of action which accrued to him as a result of a motor vehicle collision which occurred in the State of Maryland in 1977.

As plaintiff, he had caused a lawsuit to be initiated in the Circuit Court for Prince George's County, Maryland (Victor M. Eisenbeiss, Jr., v. James Hubert Jarrell, et al., Law Number 78,192) under authority of certain laws, rules of procedure and rules of court, as well as under certain guarantees of the Declaration of Rights of Maryland and, of course, under the rights of protections afforded him by provisions of the Constitution of the United States.

Of great significance is the fact that, from the very commencement of

proceedings in the Circuit Court, as plaintiff, he had requested a jury trial on all issues of fact in the proceedings (Defendants did so as well.).

In the course of the proceedings, while awaiting jury trial, a Motion to Enforce Settlement was made by defendants. The Motion was not authorized under Maryland Rules of Procedure, nor any other rule of court and, in fact, merged equity and law against the practice and procedure adopted and allowed in the judicial system of Maryland.

As a result of the improper Motion, and because of the failure of the court to provide the petitioner with a fair trial in a fair tribunal (the judge's stated bias and predisposition), petitioner's rights and causes of action were summarily and arbitrarily extinguished and taken

from him against his rights under the Fourteenth Amendment of the Constitution of the United States.

What is due process of law depends upon the circumstances of a case. Due process varies with subject matter and necessities of a situation. Due process of law means following the forms of law, which are appropriate to the case and just to the parties affected. A State "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." Snyder v. Massachusetts, 291 U.S. 97,105 (1934); West v. Louisiana, 194 U.S. 258, 263 (1904); Boddie v. Connecticut, 401 U.S.

371 (1971). It must be pursued in the ordinary mode prescribed by law; adapted to the end to be attained; and, it must give a party an opportunity to be heard respecting the justice of the judgment sought. Hagar v. Reclamation District, 111 U.S. 701, 708 (1884); Hurtado v. California, 110 U.S. 516, 537 (1884).

Where a litigant has the benefit of a full and fair trial in state courts, and his rights are measured, not by laws or procedures which affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result, provided he be accorded a fair and impartial determination. Marchant v.

Pennsylvania Railroad, 153 U.S. 380, 386 (1894).

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is that an opportunity to be heard be granted, not just at a meaningful time but, in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 552 (1965) the constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to an individual, but, more particularly, to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair deprivations of property, especially when the State acts

simply upon the application of and for the benefit of a private party. Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972).

The essential ingredient to a meaningful hearing, and as of right, one is entitled to an impartial decision maker just as in criminal and quasi-criminal proceedings. Goldberg v. Kelly, 397 U.S. 254, 271 (1970); In re Murchison, 349 U.S. 133 (1955).

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. Goldberg v. Kelly, 397 U.S. 254, 266-267 (1970); I.C.C. v. Louisville & Nashville R. Co., 227 U.S. 88, 93-94 (1913); Willner v. Committee on Character, 373 U.S. 96, 103-104 (1963). Where the

evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, jealousy or money, the individual's right to show that it is untrue depends upon the unfettered rights of confrontation and cross-examination before an impartial decision maker. The Supreme Court of the United States "...has been zealous to protect these rights from erosion..." in all types of cases. Green v. McElroy, 360 U.S. 474, 496-497 (1959).

The provisions of the Bill of Rights now applicable to the States contain basic guarantees of a fair trial. Due process of law requires that the proceedings shall be fair. In order to declare a denial of due process, the Court must find that the absence

of that fairness fatally infected the trial; that the acts complained of must be of such a quality as necessarily prevents a fair trial. Lisenba v. California 314 U.S. 219, 236 (1941). There are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless, Chapman v. California, 386 U.S. 18 (1967); Harrington v. California 395 U.S. 250 (1969); Schneble v. Florida, 405 U.S. 427 (1972); Milton v. Wainright, 407 U.S. 371 (1972), as for example the influence of contemptuous misbehavior in court upon the impartiality of the presiding judge. Fisher v. Pace, 336 U.S. 155 (1949); Ungar v. Sarafite, 376 U.S. 575 (1964); Holt v. Virginia, 381 U.S. 131 (1965); Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Johnson v. Mississippi, 403 U.S. 212 (1971); Illinois v. Allen, 397

U.S. 337 (1970); Tumey v. Ohio, 273 U.S. 510 (1927); Taylor v. Hayes, 418 U.S. 488 (1974); Ward v. Village of Monroeville, 409 U.S. 57 (1972).

Bias of prejudice either inherent in the structure of the trial system or as imposed by external events will deny one's right to a fair trial.

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." In re Murchison, 349 U.S. 133, 136 (1965).

The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. "The vital

requirement is State responsibility," Justice Frankfurter once wrote, "that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme" to deny protected rights. Terry v. Adams, 345 U.S. 461, 473 (1953).

A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The provisions of the Fourteenth Amendment must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection

of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. Ex parte Virginia, 100 U.S. 339, 346-347 (1980); Cooper v. Aaron, 358 U.S. 1, 16-17 (1958); Sterling v. Constantin, 287 U.S. 378, 393 (1932); Mooney v. Holohan, 294 U.S. 103, 112, 113 (1935); Griffin v. Maryland, 378 U.S. 130 (1964); Screws v. United States, 325 U.S. 91 (1945).

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." United States v. Classic, 313 U.S. 299, 326 (1941).

At no time since defendants' filing of the Motion to Enforce Settlement, was petitioner accorded the rights and protections due him under the Fourteenth Amendment:

The Motion to Enforce Settlement did not follow the authorized forms of law or procedure in effect in the State of Maryland at the time it was filed, nor does it presently;

Petitioner was denied an opportunity to be heard in a meaningful manner in a proceeding (though unauthorized) where the evidence consisted of testimony of individuals; because, in fact,

The judge in the Circuit Court was bias and predisposed as to the credibility of certain witnesses and his stated bias and predisposition fatally infected the proceedings; and

The failure of the trial judge to recuse himself and also to permit a hearing upon a motion and by a procedure not authorized in Maryland was, by the action of the judge, and therefore of the Court and State of Maryland, the denial to petitioner of a fair trial in a fair tribunal; the termination of his rights and causes of action in court; and, violative of the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States.

This case presents issues of paramount importance and going directly to the heart of the protections and inhibitions mandated by the Fourteenth Amendment which was designed to enure to the benefit of all citizens of the United States, without exception.

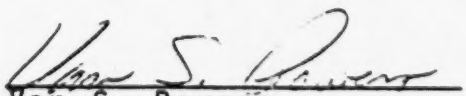
It is most likely that review and consideration of this case, or of any case of similar quality and circumstance, by the Supreme Court would result in a remand to the original court for re-consideration and remedial action by way of a new trial at the very minimum, because of the obvious, blatant violation of basic protections assured under the Constitution of the United States.

Respectfully Submitted,

Van S. Powers
Thomas F. Kennedy
Charles J. Goddard
Attorneys for Petitioner
4344 Farragut Street
Hyattsville, Maryland
301 277-3311

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of May, 1983, a copy of the foregoing document was mailed postage prepaid to Francis X. Quinn, Esquire, 25 Wood Lane, Rockville, Maryland 20850; William N. Zifchak, Esquire, P.O. Box 550, Upper Marlboro, Maryland 20772; and Henry E. Weil, Esquire, One Central Plaza, #1009, 11300 Rockville Pike, Rockville, Maryland 20852.



Van S. Powers

APPENDIX (1)

TRANSCRIPT OF PROCEEDINGS DATED DECEMBER 17, 1981
IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VICTOR M. EISENBEISS, JR.,

Plaintiff,

vs. : Law No. 78,192

JAMES HUBERT JARRELL

and

AVIS RENT-A-CAR SYSTEM, INC.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Courtroom No. 1
County Courthouse
Upper Marlboro, Maryland
Thursday, December 17, 1981

The above-entitled matter came on for hearing in open court at 11:40 o'clock a. m.

BEFORE:

THE HONORABLE JACOB S. LEVIN, Associate Judge.

APPEARANCES:

JOHN E. BECKMAN, JR., ESQUIRE, appearing on behalf of the Plaintiff.

FRANCIS X. QUINN, ESQUIRE and WILLIAM N. ZIPCHAK, ESQUIRE, appearing on behalf of the Defendants.

PHYLLIS E. JACOBS
Official Court Reporter
P. O. Box 401
Upper Marlboro, Maryland 20772

C O N T E N T S

P R O C E E D I N G S

THE DEPUTY CLERK: Law 78,192, Eisenbeiss versus Jarrell.

THE COURT: Mr. Beckman, Mr. Quinn, how are you gentlemen today? Mr. Zifchak, how are you today, sir?

MR. ZIFCHAK: Fine, Your Honor.

THE COURT: Everybody ready to proceed?

MR. BECKMAN: We are ready, Your Honor.

THE COURT: Tell me why we are here today, Mr. Beckman. Oh, it's your motion, Mr. Quinn.

MR. QUINN: This is a motion, Your Honor, to enforce settlement.

Basically, the position of the defense in this case is that there was an agreement between counsel to settle this case for $75,000, and as far as counsel is concerned, the case was settled.

Shortly, I think a day or so, after the actual settlement, apparently the client, Mr. Eisenbeiss, indicated he did not want to settle the case as a result of which the case was taken out of the assignment and rescheduled for trial.

We then have filed this motion to enforce the settlement that was entered into.

THE COURT: Is there a trial date on this case?

MR. QUINN: Yes, Your Honor. I believe the trial date is March 1 of 1982, Your Honor.

THE COURT: What do you want to tell me?

MR. QUINN: I would like to call, Your Honor --

THE COURT: (Interposing.) You want to put some witnesses on?

MR. QUINN: Yes, Your Honor.

THE COURT: Call your first witness.

MR. QUINN: I call Mr. Weil as my first witness, Your Honor.

WHEREUPON,

HENRY E. WEIL,

was called as a witness by and on behalf of the Defendants, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. QUINN:

Q Would you please state your full name.

A Henry E. Weil.

Q And what is your occupation?

A I am an attorney.

Q Would you indicate, basically, whom you are associated with as to the practice of law?

A Harry Jacobs' firm, which is Belli, Weil & Jacobs.

Q Where is your firm located?

A 11300 Rockville Pike, Rockville, Maryland.

Q Mr. Weil, how long have you been a member of the bar?

A Approximately 21 years.

Q And I wonder if you can indicate briefly what has been your practice?

A Primarily, it's been in the personal injury field with emphasis on personal injury and a lot of litigation. That's the bulk of my practice.

Q Would most of your work in the field of personal injury litigation involve the representation of plaintiffs?

A I would say that's the case.

Q Now, with reference to this particular case which is pending here, the case of Victor Eisenbeiss versus James Jarrell and Avis Rent-A-Car System, did there come a time when you represented Mr. Eisenbeiss?

A Yes. I was retained by Mr. Eisenbeiss on November the 8th, 1977.

Q And particularly, what was this in reference to?

A Mr. Eisenbeiss had been in two automobile accidents. One was on April the 24th, 1977. I did not represent him in connection with that accident. He had handled that, himself.

He was subsequently involved in another accident on November 4th, 1977, and I was retained to represent him in connection with the injuries that he sustained, and related claims, in the accident which occurred on November the 4th, 1977.

Q And in pursuing this claim, did you eventually file

a lawsuit?

A Yes. A lawsuit was filed in the Circuit Court for Prince George's County.

Q And the basic lawsuit that you filed is known as Law No. 78,192, is that correct?

A That's correct.

Q Now, with reference to this particular case, I wonder if you could indicate the general nature of the injury and the evaluation and settlement discussions that you had in this case.

A The nature of the injury was that Mr. Eisenbeiss had sustained a fracture of the right femur in the accident which occurred on April 24, 1977.

He had come under the care of an orthopedic surgeon, a Dr. Jeffrey Witte.

Dr. Witte had placed a pin in that right hip. It was while Mr. Eisenbeiss had the appliance in his right hip that he was involved in this second accident on November the 4th, 1977.

I had received several reports from Dr. Witte. I had conferences with Dr. Witte, and Dr. Witte was of the opinion that there probably was a new fracture through the healing callous of the right femur as the result of the second accident. That was essentially Dr. Witte's findings.

Q Did there come a time when you evaluated this case?

A Yes. That's correct.

Q And I wonder if you could just indicate what was your evaluation of the case?

MR. BECKMAN: Objection.

THE COURT: That's overruled. What was your evaluation of the case, Mr. Weil?

THE WITNESS: There was a range that I thought the case had, and that was from $50,000 up to $175,000. Somewhere in that range.

BY MR. QUINN:

Q Now, did there come a time when there were settlement conferences with reference to this case we are talking about that occurred in this case?

A Yes. There were presettlement conferences.

Q And do you recall the first settlement conference that was held?

A The first settlement conference was a conference with Judge Blackwell.

Q I wonder if you could indicate what occurred at that settlement conference.

A Yes. We had made a demand, I believe, at the time of that presettlement conference in the amount of $200,000 in settlement of Mr. Eisenbeiss' claims. There had been an offer of $37,500.

The case was not settled as a result of that settlement conference with Judge Blackwell. Subsequently, there was

a second settlement conference with Judge Woods.

Q And that was before Judge Woods?

A The second settlement conference was before Judge Woods.

Q Do you recall the date that that took place?

A The second settlement conference was on February 6, 1981.

Q I wonder if you could relate what happened at that settlement conference.

A Well, the demand was, I believe, $100,000. The settlement, the offer remained at $37,500 with some indication that the carrier might increase its offer to between 50 and $60,000, but there was never a firm offer.

The only offer that had ever been made up until the time and through the time of that second conference was $37,500.

Q Was the case settled at the second conference?

A It was not settled at the second conference.

Q Could you relate what happened after that second conference?

A Following the conference with Judge Woods, Mr. Eisenbeiss and I met here in the corridor of the courthouse, and we discussed the future prosecution of that case. It was scheduled for trial on February 23, 1981, just two weeks or so away.

I was in the process of subpoenaing the witnesses for trial. At that time, Mr. Eisenbeiss indicated that he would accept $75,000 in settlement of his claims. I then walked with Mr. Eisenbeiss to Mr. Zifchak's office, which is just down the street from the courthouse, and I did that, because I was getting ready to leave on a vacation that had been arranged for February the 13th.

So I wanted to make sure that either the case was settled before I left on vacation, or that I would have all of my witnesses ready for trial. So we went to Mr. Zifchak's office. Mr. Eisenbeiss sat out in the waiting room, the reception area, and I had a meeting with Mr. Zifchak. I told Mr. Zifchak that my client -- and I laid it right on the line -- I said we would take $75,000, which I had authority for from Mr. Eisenbeiss, rather than ask for 05 or $95,000. I told Mr. Zifchak I needed an answer rather soon, because I was scheduled to leave on my vacation.

Mr. Zifchak made a telephone call in my presence to his principal. I was not able to communicate with his principal, and so we left Mr. Zifchak's office with the understanding that if he could obtain authority for the $75,000, that he would let me know as soon as he could.

Q And basically, the offer to settle for $75,000 was outstanding at that point in time?

A Yes, it was.

Q Now, could you indicate what happened after that?

A Yes. The following week, I think I spoke with Mr. Zifchak once or twice to inquire as to whether or not he had any response from his principal. He indicated that he had not.

I told him that I was getting ready to leave on vacation on the 13th of February, and that if he had, if he obtained the authority for settlement to simply call my office and let us know.

I left town on the 13th of February, and during the time that I was away, Mr. Zifchak did call and accepted our settlement demand, and communicated that to my partner, Harvey Jacobs.

Q And I wonder if you could indicate -- you went away on vacation. What was your next association with the case?

A While I was away on vacation, I received a telephone call from my partner, Harvey Jacobs, advising me that the offer of settlement had been accepted by Mr. Zifchak's principal, and I subsequently asked my secretary to release all of the witnesses from the subpoenas.

Q You had, apparently, subpoenaed several witnesses and lined them up for trial?

A That's correct.

Q Now, did you then, immediately before the trial date, return to this area?

A Yes. I returned on the 22nd of February, which was

the Sunday prior to the Monday morning that the trial was to start, and that's when I returned.

Q Did you have any discussion with Mr. Eisenbeiss on that particular day?

A Yes. I spoke with Mr. Eisenbeiss that evening, and I told him, confirmed that the company, the principal, Mr. Zifchak's principal, had accepted the settlement offer of $75,000. At that time, Mr. Eisenbeiss indicated that he had changed his mind; that he was not happy with the $75,000, and that he wanted to have his day in court.

I told Mr. Eisenbeiss that, to my mind, the case was settled, and that presented a problem. I suggested that he meet me in court the following morning, which was the 23rd of February, and he did that.

Q I assume you communicated with Mr. Zifchak on the 22nd of February, that Sunday?

A I don't know whether I spoke with Mr. Zifchak that Sunday or not. I know I saw him that morning, Monday on the 23rd.

Q On February 23rd, can you tell us what happened?

A On February 23, we met in the courthouse. Mr. Zifchak, Mr. Eisenbeiss and I. Mr. Eisenbeiss reaffirmed the fact that he did not want to follow through with the settlement; that he was not happy with it, and we then had a conference with Judge Levin in chambers to try to determine what could be done, if

anything.

Q Let me ask you this: Do you recall what occurred in chambers before Judge Levin at that time?

A I do. First, Mr. Zifchak and I talked with His Honor, and we explained the situation to him. The Judge then indicated that he would talk with Mr. Eisenbeiss.

Mr. Eisenbeiss appeared in chambers with Mr. Zifchak, I, and Judge Levin, and indicated that he had changed his mind. He didn't wish to pursue the settlement.

The Judge then asked Mr. Zifchak what it was that he wanted to settle the case, and Mr. Eisenbeiss indicated that he felt that his case should be settled somewhere in the neighborhood of a million dollars, but that he would take $200,000 to settle the case.

His Honor, as I recall, indicated that there was nothing further that he could do, other than to pull the case out of the assignment and reschedule it for trial, and that was done. The new trial date of March 1st, 1982, was scheduled.

Q Was that, basically, the end of your representation or your involvement with Mr. Eisenbeiss, as far as this settlement offer?

A Mr. Eisenbeiss then indicated that he no longer wanted me to represent him; that he would talk to another counsel, and he subsequently talked to other counsel. I then withdrew, ultimately withdrew my appearance by filing a line

whereby Mr. Beckman and his firm entered their appearance on Mr. Eisenbeiss' behalf.

MR. QUINN: That's all I have.

CROSS-EXAMINATION

BY MR. BECKMAN:

Q Mr. Weil, just a couple of things. The second settlement conference, which you say was before Judge Woods on the 6th of February, the carrier did, at that time, did they not, say that they would, in fact, provide you with a firm offer of $60,000 as of that day, is that correct?

A There was an indication by Mr. Zifchak that the offer might be made. My recollection is that it was not a firm offer, however, but that they might be inclined to go up to 50 or $60,000.

Q Now, you then left for vacation on the 13th of February?

A Yes.

Q You, at some point in time, before going on vacation, also had an office conference, did you not, with Mr. Eisenbeiss to prepare him for trial?

A That's correct.

Q At that time, had you had any further word concerning the possibility of the defense in this matter coming up with another offer?

A I met with Mr. Eisenbeiss, either the day that I left

the office, or the day prior to my leaving the office, by whic time the settlement offer of $75,000 had not yet been acted upon by Mr. Zifchak's principal.

Q So, at that particular [illegible], at the time of that office conference, in other words, there was no settlement and you all were preparing for trial, is that correct?

A That's correct.

Q Now, you have also testified, then, this morning --

A (Interposing.) Let me correct that. When I say, "preparing for trial," we had already prepared fairly well for trial, but it was a further conference.

Q As most of us have to go over it?

A Right.

Q Now, with regard to what transpired then, while you were on vacation concerning conferences between Mr. Zifchak and other persons in your firm, you have no personal knowledge of what those transactions actually were, is that correct?

A That's correct.

Q You also indicated, I believe, in your testimony, that you had received a telephone call while you were on vacation, is that correct, from your secretary or someone?

A Yes. From Mr. Jacobs.

Q Were you out of the country?

A I was out of the country.

Q But you received a telephone call, overseas call

concerning this matter from someone in your office?

A That's correct. Yes, I did.

Q The 20th, you were not in the country at that time, were you, sir, the 20th of February?

A I was out of the country from February 14 to February the 21st.

Q So then any conferences that may have been had concerning the actual final settlement in this matter for $75,000, you had no actual part in, is that correct, between Mr. Zifchak or a member of your firm? You had no conference on that date with Mr. Zifchak?

A On which date?

Q On the 20th?

A No, I had no conference with Mr. Zifchak on the 20th.

MR. BECKMAN: That's all I have.

REDIRECT EXAMINATION

BY MR. QUINN:

Q Mr. Weil, as far as any further discussions, as far as settlement of this case, once you had left, what had to be done, or what was there remaining to be done, as far as this offer of settlement was concerned?

A It would have to be accepted by Mr. Zifchak's principal.

Q And, basically, was that really what you were waiting for, your firm was waiting for, the response from Mr. Zifchak?

A That's correct.

Q And at this office conference that you had, that counsel referred to with Mr. Eisenbeiss, do you recall whether there was any discussion at that time with reference to the settlement offer?

A Well, we knew that the settlement offer of $75,000 had been made to Mr. Zifchak. I told Mr. Eisenbeiss at the time of our conference; that is, the day that I left or the day before, whenever that conference was, that it had not yet been acted upon, but that if it was, he would be notified.

Q And one final question. As far as this figure of $75,000, can you state, in your judgment, your opinion, as to how you felt about it, whether or not it was a good offer of settlement?

MR. BECKMAN: Objection.

THE COURT: That's overruled.

THE WITNESS: I thought it was, in view of all of the circumstances surrounding the case.

MR. QUINN: That's all I have. Thank you.

THE COURT: Do you have anything?

RECROSS-EXAMINATION

BY MR. BECKMAN:

Q Mr. Weil, concerning the $75,000, you have indicated, I believe in your prior testimony, that some point in time Mr. Eisenbeiss had indicated that if he were able to get $75,000,

you would settle the case, is that correct?

A That's correct. He said that he authorized me to accept $75,000 in settlement.

Q Mr. Weil, isn't it a fact that it was more along the lines of if he had a firm offer of 75 he would consider accepting that?

A That's not true.

MR. BECKMAN: Nothing further, Your Honor.

THE COURT: What did you say, that's not true?

THE WITNESS: Yes. That's correct.

THE COURT: Thank you very much, Mr. Weil.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Call your next witness.

MR. QUINN: Mr. Jacobs.

WHEREUPON,

HARVEY A. JACOBS,

was called as a witness by and on behalf of the Defendants, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. QUINN:

Q Please state your full name.

A Harvey A. Jacobs.

Q And, Mr. Jacobs, you are engaged in the practice of

law, is that correct?

A Yes, I am.

Q For how long have you been engaged in the practice of law?

A Almost 30 years.

Q Now, are you a partner of Mr. Weil?

A Yes, I am.

Q And how long have you and he been partners?

A Since October of '69.

Q As to your practice, Mr. Jacobs, could you just briefly indicate what it consists of, or what it basically involves.

A Our prime practice is in the litigation field, although we do have a general practice.

Q Over the years, you have been involved in substantial personal injury litigation?

A Considerably. That's the main part of our practice.

Q Now, also, with reference to that, you have represented the plaintiffs over the years?

A Yes, I have.

Q And as far as personal injury litigation, you probably represent more plaintiffs than, say, defendants, is that correct?

A The first eight years I represented insurance companies. After that, I represented plaintiffs solely.

Q Now, Mr. Jacobs, with reference to this case of Victor Eisenbeiss that we are talking about here today, I wonder if you could indicate to me when you became involved in the settlement of the case in any way.

A I became involved in February of this year.

Q And could you tell us, particularly, what happened or what occurred in February of this year as to your involvement in this case?

A Yes. I received a call from Mr. Zifchak stating that he had accepted our offer to settle the case for $75,000.

Q Now, at that point in time, what did you do at that point?

A I called Mr. Eisenbeiss and informed him that they had accepted our settlement of $75,000.

Q And you did that because Mr. Weil was out of the country, is that correct?

A That's correct.

Q And I presume that you were, in effect, expecting a call from Mr. Zifchak?

A That's correct.

Q And as far as you can recollect, was that the only discussion you had with Mr. Zifchak up to that point in time?

A Up to that point in time, that was the only conference I had.

Q After receiving the call about the $25,000, what did

you do then?

A I notified Mr. Eisenbeiss that they had accepted our offer of $75,000.

Q And what was his response?

A He said he was pleased, but he wanted the right to change his mind.

Q What did you say to him?

A I told him that it was a final settlement; that there was no way that he could change his mind, but he insisted that he wanted the right to change his mind.

Q And did you then contact Mr. Weil?

A Yes. In view of that, I contacted Mr. Weil and told him that the company had accepted our offer to settle the case for $75,000, but that Victor wanted the right to change his mind.

Q And what happened at that point? Was that the end of the discussion?

A That's the end of when I was in on it. Mr. Weil took over from that point.

Q And anything that happened from that point on was then between Mr. Weil, Mr. Eisenbeiss and Mr. Zifchak?

A That's correct.

MR. QUINN: I don't have anything further.

CROSS-EXAMINATION

BY MR. BECKMAN:

Q Mr. Jacobs, you indicated you became involved in this particular case on behalf of the firm, I assume, in February.

Was this phone call from Mr. Zifchak on a particular day in February really the first involvement you have ever had in this case?

A Other than knowing that it was in the case, and knowing peripherally what it was about.

Q Knowing the case was in your office?

A And I knew we had made an offer of settlement through Mr. Weil, and he had settled the case for $75,000, and Victor had authorized it.

Q How long had you known that?

A I am sure I knew it from the time they made the offer to settle.

Q Do you recollect the date that you received the call from Mr. Zifchak?

A I think it was around the 20th.

Q Do you remember approximately what time of day it was?

A I would really just be guessing. I don't remember what time of day.

Q How many conversations did you have with Mr. Zifchak that day?

A I believe I only had the one.

Q How many conversations did you have with Mr. Eisenbeiss?

A I may have had two.

Q It is a fact, I believe, then, Mr. Jacobs, that you called Mr. Eisenbeiss after hearing from Mr. Zifchak?

A That's correct.

Q And is it not a fact that during that first conversation, you indicated to him that you really didn't have a firm $75,000, but that they were definitely thinking about it; something of that nature?

A No. I told him that they made me an offer -- when I said, "Made me an offer," they accepted our offer of $75,000.

Q What was the second conversation Mr. Eisenbeiss was involved in?

A I think he called me back and insisted that he wanted the right to change his mind.

Q Actually, I think you said he said he wanted the right to change his mind when you talked to him the first time, is that correct?

A That's correct.

Q So he never expressly accepted the $75,000 offer during that conversation?

A I didn't need his acceptance.

Q You didn't need his acceptance?

A I so informed him of that, that as far as I knew, we had made them an offer of $75,000. They had accepted, and once that's done, it's all over. There is no way that he could have

a right to change his mind.

Q But you had not been involved in the initial dealings of this?

A That's correct.

Q So the only knowledge you had that there had been any conversation with Mr. Eisenbeiss concerning his accepting $75,000, was something you had been told by somebody else, is that correct?

A That's correct.

Q So when you spoke with him and said, "We have $75,000," he immediately, at that time, told you that he wanted the right to change his mind?

A That's correct.

Q And he also said that during the second conversation?

A I believe he did. There were two conversations.

MR. BECKMAN: I have nothing further.

REDIRECT EXAMINATION

BY MR. QUINN:

Q When you spoke to him the first time, and he made reference of a right to change his mind, but before that, what did he say? Did he indicate to you that he was happy with the settlement?

A He said he was pleased, but he wanted the right to change his mind.

MR. QUINN: That's all I have. Thank you.

MR. BECKMAN: Nothing further, Your Honor.

THE COURT: Thank you very much.

(Witness excused.)

MR. QUINN: Mr. Zifchak.

THE COURT: Before you get to Mr. Zifchak, I have to take a jury verdict, so have a seat.

(Whereupon, there was had a short break after which the following proceedings took place:)

WHEREUPON,

WILLIAM N. ZIFCHAK,

was called as a witness by and on behalf of the Defendants, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. QUINN:

Q Would you please state your full name.

A William N. Zifchak.

Q What is your occupation?

A I am an attorney.

Q How long have you been an attorney?

A Approximately 11 years.

Q And I want you to just indicate, basically, what is your practice?

A Litigation. Primarily insurance company defense work.

Q And defense of personal injury litigation?

A Correct.

Q Mr. Zifchak, in reference to this case of Victor Eisenbeiss versus James Jarrell and Avis Rent-A-Car System, this matter was referred to you by Liberty Mutual Insurance Company?

A No. Actually it was referred by an independent adjustment company called Schooley & Company in Baltimore for advice. At the time, they were self-insured. Liberty came into the case too after for the defense a couple of months later.

Q You then defended this case?

A Yes. That's correct.

Q Now, I wonder if you could just indicate, with reference to the case, itself, as to the defense of it, and you might say the settlement posture of it. Can you give us that?

A Yes. Initially, the claims being presented, on behalf of Mr. Eisenbeiss, were many and broad ranging, and his discovery progressed, including the taking of medical depositions, the obtaining of records from prior physicians, obtaining the records of hospitalizations. It became clear to me that roughly 90 percent of the specials being claimed, in fact that are on the pre-trial statement, were totally unrelated to any injuries which any physician causally related.

MR. BECKMAN: Objection. Move to strike the testimony.

I don't see whether this has anything to do with whether or not this gentleman authorized settlement or not.

THE COURT: It really doesn't, but I will give it whatever weight I deem it.

THE WITNESS: The bottom analysis was that I felt that my evaluation of the case was that we had a 10 to 15 percent chance of win outright on the liability issue, and the adverse jury verdict range was from 15,000 to $90,000, which is a very broad range, I admit.

BY MR. QUINN:

Q Now, with reference to the settlement discussions that you had with Mr. Weil, I wonder if you could relate those settlement discussions.

A Initially advised they were offered $37,500, before I had the case. That's at a time when I believe the demand was $75,000, or possibly a little bit less than that. I never increased that offer, and didn't recommend any increase as of the first pre-trial settlement conference before Judge Blackwell, at which point the demand stood at $200,000, and the offer was $37,500.

At the same time, the carrier, apparently, had more concern about the case than I did, and they were looking for an offer that might settle the case, that would be reasonable. In discussing it, partly in acquiescence to their desires, I felt that I could recommend what I felt the exposure was,

somewhere in the range of 50,000 to $60,000. The carrier asked me if I felt that would settle the case, and I said that frankly I didn't think it would. They said, "What do you think might settle it?" And I said, "Seventy-five once would have, and I think that probably would settle it," so at that point I advised Mr. Weil that I was prepared to recommend 50 to 60, and I think that was during the conference, itself, because that's the reason why the second pre-trial settlement conference was scheduled, and that came out before Judge Woods.

Q And can you relate what happened at the settlement conference before Judge Woods?

A All right. At that point, I still didn't have any specific authority from the company. What had happened was the claims supervisor, with whom I had been dealing, had gone to the home office. The file was being handled by someone new, who we just didn't have the same quick communication that I had enjoyed before. It was after the February 6th pre-trial in front of Judge Woods, in which I saw for the first time a meaningful change in the plaintiff's settlement position, the demand was now $100,000, that I went to my office and I received a phone call from my receptionist, and Mr. Weil was there with Mr. Eisenbeiss. He asked if he could talk to me. I said, "Come on up."

We sat for about a half hour, and the conference was pretty much the way Mr. Weil testified to. He told me that

bottom bone to settle the case is $75,000. He said that authority is from Mr. Eisenbeiss.

What did I think about the chances of getting it. I told him that although I had no authority, based on the earlier conferences with Mrs. Neal of Liberty, my impression was that she would go for $75,000, and would try to get that from home office. I told him I thought there was a good chance.

THE COURT: How did you know Mr. Eisenbeiss was there?

THE WITNESS: Well, Mr. Weil told me he was there, and after the conference, I went downstairs with Mr. Weil and saw Mr. Eisenbeiss laying asleep on the bench in my waiting room.

THE COURT: All right. Go ahead.

THE WITNESS: I tried to contact Mr. Slocum of Liberty while Mr. Weil was there, and I couldn't get through to him. Physically, I couldn't get through. The feeder lines interrupt, and occasionally you just can't get a phone call.

We had a discussion that Mr. Weil would be leaving on vacation, and it would be nice if we could have a definitive answer before he did.

I had several follow-up conversations with Mr. Slocum, but he just wasn't communicating, being able to get the authority from the home office.

I have a very clear memory of this. Mr. Weil told me that because he was going on vacation, he was all set to go to trial, that if I did get the 75,000 to settle the case, I should call Mr. Jacobs, and he would reach Mr. Weil.

On February 20, I received word from Liberty that I had the $55,000. For some reason I was at home. I couldn't reach Mr. Jacobs, so I went home early and I called him at home -- at the office. I was at home and said, "Harvey, we got the $75,000. We are settled." And he said, "Fine. Just let me call Henry." And I said, "There is really no need to call him. We are settled," and he said, "Bill, I am just covering this to take the advice, and I just want to talk to Henry." I said, "Fine. Call me back."

Mr. Jacobs did call me back. There was a second conversation, and he said, "I reached Harvey at the beach. I told him what you said, and he said that we got a deal." I said, "We do have a deal."

The following morning I called off all of the witnesses whom I had subpoenaed, and as far as I was concerned, the case was settled.

BY MR. QUINN:

Q When did you next have anything to do with the case, or any conversation with either Mr. Weil or Mr. Jacobs?

A On Sunday, I think it was late afternoon, Mr. Weil called me, reached me at home and said, "Bill, we have a

problem." I said, "What is it?" And he said, "Victor says that he has changed his mind and wants to go to trial." I said, "Hell, Henry, he can't. Besides, I called all my witnesses off and I am not ready to go to trial." He said, "Well, I called mine off too. We have a settlement." He said, "What should we do?" I said, "Well, we have to go to court tomorrow and see what happens."

Q And you did come down to court the next day?

A We were on, "to be assigned," with no judge specially set.

THE COURT: That's where they usually end up around here, "Judge pending."

THE WITNESS: We found Judge Levin, in lieu of, "Judge pending," and explained to him that we had a problem, and because we weren't sure what to do, we asked if the Court would listen to what the problem was.

BY MR. QUINN:

Q Then, were you involved in the conversation that Mr. Weil related as to what occurred?

A Yes, I was.

Q And what is your recollection?

A The Court had asked Mr. Weil -- first the Court wanted to know if there was any dispute between Mr. Weil and I as to whether or not there was a settlement, and we said no, as far as we are both concerned it was a valid binding

settlement.

The Court asked Mr. Weil if it was a matter of fee or something, and Mr. Weil said no. The Court then -- I don't know if Mr. Weil suggested that the Judge might want to talk to Mr. Eisenbeiss, I think Mr. Eisenbeiss expressed an interest in speaking with the Judge. In any case, the Judge agreed to speak with him, and Mr. Eisenbeiss came in, introductions were made, and as I recall it, Mr. Eisenbeiss said that he had authorized Mr. Weil to accept, but now he didn't feel it was enough, because of stresses that he had been under, and he didn't specify what the stresses were, and no one asked.

THE COURT: Would you repeat what you just said?

THE WITNESS: You asked Mr. Weil, I think you asked him, if he had authorized Mr. Weil to settle for $75,000.

THE COURT: You said Mr. Weil. Do you mean Mr. Eisenbeiss?

THE WITNESS: Mr. Eisenbeiss had authorized Mr. Weil.

THE COURT: This is what Mr. Eisenbeiss said?

THE WITNESS: You asked whether or not --

THE COURT: (Interposing.) I asked him?

THE WITNESS: I believe you did.

THE COURT: All right. Go ahead.

THE WITNESS: And he said that he had, but that now he didn't feel it was enough, because of certain stresses.

I know he said stresses, because I reported it to the company by letter two days later, and in that report I quoted the word, "stress." I remember him saying it. He didn't say what they were, and no one asked.

The Court asked, in response to that, "Well, what do you want?" And Mr. Eisenbeiss said, "I want a million dollars, but I would ask" -- the Court said, "What would you take to settle here and now?" And Mr. Eisenbeiss thought for a second and said, "Two hundred and seventy-five thousand dollars," at which point everyone bid one another a good day.

The Court said, "There is nothing I could do about it," and advised Mr. Weil and I to go downstairs to the Assignment Office; that he would take the case out of assignment, and give it a new date. That was done.

BY MR. QUINN:

Q That, basically, was the end of your discussion, or as far as the settlement of this case was concerned?

A Well, not entirely. I advised Mr. Weil, after that, after checking with the company, that we did intend to proceed with a motion to enforce the settlement.

I was told by Mr. Weil, I think, that maybe we jointly suggested this, to hold off on taking any action for a little bit, with the expectation that Mr. Eisenbeiss would, in my view, come to his senses, and accept -- you can object if you want, but I will give you my characterization of the

settlement. I thought it was an extraordinary settlement offer.

The next thing that happened was I had a call from Baltimore, a Mr. Clarence Thomas who called and said he was asked by Mr. Eisenbeiss to evaluate the case from top to bottom, and the discussion I had with him, pending his advice, perhaps I would be better not filing any motions, and this continued for a period of several months.

THE COURT: What continued?

THE WITNESS: Where I was waiting for a definitive answer from someone as to whether or not Mr. Eisenbeiss intended to accept the $75,000, or continue the effort to renege on the agreement.

I wrote, I think, both Mr. Thomas and Mr. Weil, at least once, saying that I am holding off on filing the motion pending that definitive statement, but don't take my silence --

THE COURT: (Interposing.) Do you have a copy of the letter, Mr. Zifchak?

THE WITNESS: Yes, Your Honor.

MR. BECKMAN: Excuse me. This is a letter to the carrier?

THE COURT: No. This is a letter to Mr. Thomas and Mr. Weil that I am interested in. He has answered a question for me that's been in the back of my mind.

Have you seen this?

MR. BECKMAN: No.

THE COURT: Give this to him.

THE WITNESS: There is another correspondence.

THE COURT: Subsequent to the letter?

THE WITNESS: Yes. This is a letter of May 8, 1981, to Mr. Thomas.

THE COURT: Do you have any other correspondence? Give it all to Mr. Beckman. After somebody is through with it, give it to the Clerk.

MR. QUINN: Your Honor, Mr. Zifchak's letter --

THE COURT: (Interposing.) Evidently we have another one.

THE WITNESS: This is a letter to the carrier, Your honor, in which I say that I have been advised --

THE COURT: (Interposing.) Give it to Mr. Quinn to give to Mr. Beckman.

THE WITNESS: Yes, Your Honor.

MR. QUINN: Mark this as Defendants' Exhibit No. 1, which is Mr. Zifchak's letter of April 3rd, 1981.

THE DEPUTY CLERK: Defendants' 1 marked for identification.

(Whereupon, Defendants' Exhibit No. 1 was marked for identification.)

MR. QUINN: Defendants' Exhibit 2 is Mr. Zifchak's letter of May 8, 1981, to Mr. Thomas.

THE DEPUTY CLERK: Defendants' 2 marked.

(Whereupon, Defendants' Exhibit No. 2 was marked for identification.)

THE DEPUTY CLERK: Defendants' Exhibit No. 3.

MR.QUINN: Defendants' Exhibit No. 3 is Mr. Zifchak's letter of May 20, 1981 to Mr. Wood at Liberty Mutual.

(Whereupon, Defendants' Exhibit No. 3 was marked for identification.)

THE COURT: Mr. Beckman, have you seen these documents?

MR. BECKMAN: I have, Your Honor.

THE COURT: Do you have any objection?

MR. BECKMAN: I do, Your Honor.

THE COURT: What is the basis of your objection?

MR. BECKMAN: Relevance. We have a couple of letters to an attorney who is not even in the case up in Ellicott City. We have one to the carrier, after the fact, none of them having to do with anything concerning whether or not he gave express authority to his then attorney, Mr. Jacobs, and/or Mr. Weil to settle the case for $75,000.

THE COURT: All right. One, two and three are admitted.

THE WITNESS: I have a telephone memo of a conversation I had with Mr. Weil on June 12, where he called me to ask me what I intended to do, and I told him that I was going to file suit.

The reason for the nonfiling of suit between the 12th of June and the time it was filed was purely a function of my trial calendar, and I just didn't get around to doing it, but I was supposed to have done it by June 12.

BY MR. QUINN:

Q You are talking about the filing of the suit or filing of this motion?

A Filing of the motion.

Q And isn't it also correct, at some point in time you had a discussion with Mr. Sakayan?

A Yes. I became aware that Mr. Sakayan --

THE COURT: (Interposing.) You got a call from somebody else?

THE WITNESS: I became aware, Your Honor, in the legal community, that Mr. Eisenbeiss was, apparently, seeing a number of attorneys throughout this period of time, one of them was Mr. Sakayan. With my knowledge of that in the back of my mind, caused me to hold off, because I felt that sooner or later someone was going to convince him to take the $75,000, and I wouldn't have to go with the dual expense to my carrier of proceeding with the motion and retaining outside counsel.

MR. QUINN: I don't have anything further.

THE COURT: Mr. Beckman.

CROSS-EXAMINATION

BY MR. BECKMAN:

Q Mr. Zifchak, I have two questions, really.

In your dealings with this case and with the attorneys involved, and with Mr. Eisenbeiss personally, did Mr. Eisenbeiss ever directly indicate to you, at any particular time, either in court here or over there in your office or anything, that he would accept $75,000 as settlement of this case

MR. QUINN: I object to the question.

THE COURT: Just a minute. What is that?

MR. QUINN: I object to the question.

THE COURT: It's overruled.

THE WITNESS: Yes. In fact, I would say yes. The office conversation that I had with Mr. Weil, in which he told me that he had authority of $75,000, and it was along the lines of not $74,900, but $75,000, I said I will deal with it in that fashion, and I won't nickel dime you. Either I will get it or I won't.

When we went downstairs and he nudged Mr. Eisenbeiss to get him up, Henry said to Victor that he couldn't get -- Mr. Zifchak couldn't get through to anybody, but he will let us know as soon as he can.

I felt sorry for Victor, and I said something like, "Take care of yourself," or something like that. "It will work out."

So yes, Mr. Eisenbeiss was there. He was.

BY MR. BECKMAN:

Q He was there in the office?

A He was there physically when Mr. Weil said to him that he is going to get back to us and let us know as soon as he can. So I put the two together, and the statement of authorization, and I would interpret that, and I assumed that Mr. Eisenbeiss — that it related directly to the $75,000 offer of settlement.

Q That's an interpretation. In other words, he didn't say to you, "Mr. Zifchak, I will take $75,000 if you give it to me"?

A No. He didn't say those words.

Q Were you ever a party to a conference between Mr. Weil and this gentleman, or Mr. Jacobs and Mr. Eisenbeiss where you specifically heard him tell them, "I expressly authorize you to accept $75,000 to settle my case"?

A No. That's not a conversation I would be privy to.

MR. BECKMAN: That's all I have.

THE COURT: Thank you very much, Mr. Zifchak.

(Witness excused.)

THE COURT: Call your next witness, Mr. Quinn.

MR. QUINN: That is my presentation.

THE COURT: Call your first witness.

MR. BECKMAN: Your Honor, we would call Mr. Eisenbeiss to the stand.

WHEREUPON,

VICTOR M. EISENBEISS, JR.,

Plaintiff herein, was called as a witness by and on his own behalf, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BECKMAN:

Q Sir, would you state your full name, please.

A Victor M. Eisenbeiss.

Q What is your current resident address, please?

A 308 Philadelphia Avenue, Takoma Park, Maryland.

THE COURT: Where?

THE WITNESS: Philadelphia Avenue, Takoma Park, Maryland. Three O eight.

BY MR. BECKMAN:

Q What is your age, Mr. Eisenbeiss?

A Twenty-nine.

Q And are you currently employed?

A No.

Q Now, to get right down to the case at hand, Mr. Eisenbeiss, you heard testimony that you were apparently injured in an automobile accident in February of 1977, is that correct?

A No. It was April 24, 1977.

Q November of 1977.

A November 4th of '77 was the second one.

Q My mistake. I should have had the other yellow pad.

And that you subsequently retained Mr. Weil and his firm to represent you in this case, is that correct?

A Yes.

Q Now, there has also been testimony that as the case progressed, or really getting closer on to the trial of the matter, that there were two settlement conferences held in this case in the court here; that the first one was held before Judge Blackwell of this court.

Did you attend that settlement conference?

A No. I was in the hospital.

Q So you have no knowledge of your own, then, what went on at that particular settlement conference at all?

A Other than the copy that I received from Mr. Weil.

Q To the best of your recollection, what was the demand that you were making, or advising Mr. Weil to make on your behalf at that particular time?

A If I can remember what the copy said, it was $200,000.

Q And do you recollect, of your own personal knowledge and recollection, what was transmitted to you as the carrier's current offer, as of the first settlement conference before Judge Blackwell?

A The copy said $37,500.

Q And, now, there has also been testimony that there

was, in fact, a second settlement conference heard on or about the 6th of February of this year, heard in front of Judge Woods of this court. Did you attend that settlement conference?

A Yes, I did.

Q And could you relate to the Court what your recollection is of what transpired at that conference?

A I stayed out in the secretary's lobby while Mr. Weil and Mr. Zifchak went to the Judge's chambers. I waited there for maybe an hour or so. At that time, they came out and Mr. Weil said that the insurance company would offer $60,000, and that was a firm offer; that they wouldn't go any higher than that, and that they were not negotiating any further. No higher offers.

Q And this conference took place where, then, in Judge Woods' chambers, or outside of his chambers?

A This took place in the hall outside the chambers.

Q Now, did you subsequently travel up the street to Mr. Zifchak's office that day?

A Yes. Mr. Weil said that Mr. Zifchak wouldn't negotiate any more, any further, and I said, "Well, Mr. Weil, maybe we should go and try to open up negotiations again, since I refused the $60,000, and time is closing in on the court date, and I would like to have negotiations opened up, and continued to be opened up until the trial date."

So, I talked to Mr. Weil, and we decided that we

should go over to Mr. Zifchak's office to reestablish contact, reestablish negotiations.

At that time, I told Mr. Weil that $60,000, I can't accept that, because my medical bills and my personal debts and everything -- I just couldn't accept that.

Q Now, when you got over to Mr. Zifchak's office, can you relate to the Court what you recall happened then?

A Yes. I waited in the lobby there, in the secretary's lobby there while Mr. Weil went up to Mr. Zifchak's office. I waited there for a while, and there was nothing I could do but just wait further.

I came down with a very, very bad headache, very bad headache, and I laid down on the couch, and, I guess, it was about an hour, an hour and a half -- I can't remember exactly, but it seemed like a long time. Mr. Weil came down and said that Mr. Zifchak was not authorized to settle for any higher than $60,000, and that he would have to call his insurance carrier to see whether they would offer anything further than that.

When we left through the door, Mr. Weil said that Mr. Zifchak is very hard-nosed about it, and we would just have to go to court, and that's my own thoughts on the matter, just to continue the court anyway, since I refused the $60,000, and just wait until the date of trial.

Q Following the 6th, when you were here in court with

Judge Woods, and then went up and talked with Mr. Zifchak, or your attorney talked to Mr. Zifchak, did you see your attorney then following that prior to trial again?

A Yes, I did. I saw him on February the 13th.

Q Where did you see him?

A I saw Mr. Weil in his office. My mother attended. She went with me.

At that time, the conversation just ended up with we were just going to continue to go to court and proceedings were just going along, and he advised me what would be happening and everything when we did go to court.

Q Now, were there any further discussions between you and Mr. Weil on that date; that is, the 13th, concerning settlement of the case?

A No. There was no mention of any offer of settlement or offer of any settlement being made at that time.

Q Up to this point in time, had anyone, either Mr. Weil or Mr. Zifchak or anyone else involved in the case, transmitted to you the fact or the possibility that the defense in this case might offer $75,000 to settle the case?

A No. No mention of those figures.

Q Up until that point, we are dealing with the 13th of February, had you ever expressly authorized Mr. Weil to accept the figure of $75,000 if it were to be offered by anyone?

A No.

Q. Now, on the 20th of February, testimony has been that apparently Mr. Zifchak contacted the law firm, and Mr. Weil was on vacation. Did you receive a call from Mr. Jacobs on the 20th of February?

A. Yes. It was 4:30 in the afternoon. Mr. Jacobs told me that he had received a firm offer of $60,000 from the insurance company. At that time, I refused the offer. I had already known that they were going to offer $60,000 as of the 6th of February.

During that conference, he tried to convince me of saying if the insurance company offered $75,000, would you accept, and he tried to get a commitment from me, and I said no, I will not make a decision until an offer has been made.

Ten minutes of five, 20 minutes later, Mr. Jacobs called me back at my mother's place and told me that they had already settled this, the case, for $75,000, and I said, "How can that be? I didn't authorize you to settle for $75,000. Further, you are not my attorney."

I said -- I asked him where is Mr. Weil, and he said that he was out of the country, and I said, "Well, I want to talk to Mr. Weil."

So, on February the 22nd, I met with Mr. Weil. He called me at my home at 10:00 o'clock in the morning. I met at his office at 11:00 o'clock.

It was a very heated discussion. He got very emotional about it. He said he had already made a commitment for $75,000 to settle the case. I said, "I did not authorize you to settle for $75,000." I said, "The offer hadn't even been made. How can I make a decision upon such an offer?"

I said, "You did not come to me personally and say that."

Q Well, Mr. Eisenbeiss, did you, at any time during the handling of this matter, right up to really, the 23rd, which is the trial date, ever expressly authorize either Mr. Weil or Mr. Jacobs to settle this matter on your behalf for $75,000?

A No.

MR. BECKMAN: That's all I have, Your Honor.

THE COURT: Mr. Quinn.

CROSS-EXAMINATION

BY MR. QUINN:

Q Mr. Eisenbeiss, what you are saying is that you never had any discussion at all with Mr. Weil about the $75,000?

A No.

Q And you are saying that you never authorized him to settle for $75,000?

A I did not authorize him to settle for $75,000.

Q And he never discussed it, you are saying?

A I did not even know the figure. It wasn't even

mentioned to me until February the 20th.

Q So you are saying Mr. Weil never had any discussion at any time with you about a figure of $75,000, is that correct?

A Repeat the question.

Q My question to you, Mr. Eisenbeiss, is did you ever have any discussion at any time with Mr. Weil as to a figure of $75,000 to settle this case?

A No.

Q Never occurred?

A Not before February the 20th did I know of the figure of $75,000.

Q What you are saying is the first time the mention of $75,000 was made, was made by Mr. Jacobs?

A Right.

Q Do you recall when you were over in Mr. Zifchak's office and you indicated you didn't feel good, so you went to sleep there in that couch, is that correct?

A Right.

Q Do you recall when you did that, at some point in time Mr. Weil came down and, I guess, he either woke you up or said something to you, is that correct?

A Yes.

Q Was Mr. Zifchak with him at that time?

A Yes.

MR. QUINN: The Court's indulgence. If the Court would indulge me for a moment.

I have nothing further, Your Honor.

MR. BECKMAN: Nothing further, Your Honor.

THE COURT: Mr. Eisenbeiss, thank you very much.

THE WITNESS: Thank you.

(Witness excused.)

MR. BECKMAN: We have nothing further, Your Honor.

THE COURT: What do you gentlemen want to tell me?

MR. QUINN: Your Honor, in support of this motion for settlement, I think the question is whether or not the authority existed at the time to --

THE COURT: (Interposing.) Let me ask you in that regard this: What you are saying, in effect, is that it's a question of fact or a question of law?

MR. QUINN: Well, I would think that there could be a factual question involved here.

THE COURT: All right.

MR. QUINN: And I think, as a matter of fact, there are two cases that have been decided in this area, one of them is Clark vs. Elza, and the other one is Kinkaid vs. Cessna. I will hand these to the Court.

But really, I think that under the facts of this case, what it will stand for, what these cases stand for is certainly this is a proper way to proceed. That the Court can

enforce a settlement, and that basically if there was authority, if counsel had authority to settle this case, then that is a valid agreement. It can be enforced by the Court.

With reference to this case, Your Honor, I would submit that what you have here, really, is the question of whether, basically, Mr. Weil had the authority to settle this case. Whether he had the authority from his client, and the only way that can be determined is by considering Mr. Weil, his testimony, his very detailed testimony as to his handling of the case, the settlement discussions he had, the conferences he had with Mr. Zifchak. The conference, you might say, what went on over in the office when he came down and talked to his client, and even Mr. Zifchak was a part of that conference, and although he didn't directly hear that, but the question was, "We will hear from them." A reasonable followup, you might say, or conclusion Mr. Zifchak drew from the conference that he heard the question is really uncontradicted as to what happened before the Court in chambers. It's uncontradicted, really, and I think that's really what we have had throughout the whole thing.

It's basically that we are getting down to a situation of him saying that the $75,000, he never authorized it, and yet the whole web of the case points to that, and I think it's overwhelming.

THE COURT: Well, let's assume I agree with you, what

do I do, order the deposit to be put in the registry of court and mark the case closed, or what do I do?

MR. QUINN: I think under the decisions of this case, I think the Court can order that basically the case is settled, and therefore directing that a line be filed and release is accepted.

If he does not accept that, I assume the money will have to be deposited.

THE COURT: Mr. Beckman, what do you think I ought to do in this case, sir?

MR. BECKMAN: Well, obviously, Your Honor, I think you ought to do something else. I agree wholeheartedly with Mr. Quinn that the Court certainly does have the authority here to enforce or to order an enforcement of the settlement agreement.

However, I believe they also have the authority to deny the motion to enforce the settlement agreement.

THE COURT: I don't have that problem. I was just concerned with the mechanics. That's all.

MR. QUINN: In Cessna vs. Kinkaid, Your Honor, or Kinkaid vs. Cessna, which I really believe, Your Honor, is a case wholly dispositive in this particular instance --

THE COURT: (Interposing.) What's the citation of Kinkaid?

MR. BECKMAN: It's 49 Md. App. 18.

THE COURT: Give it to me. Everybody has got copies, so I will assume that I will keep this.

MR. QUINN: This is the other case that I cited.

THE COURT: Go ahead.

MR. BECKMAN: Your Honor, very briefly, as you are reading down there, I think I can perhaps direct the Court to the Clark vs. Elza case, which is the previous case. There was no question that the initial plaintiff in the auto accident case had authorized his attorney, his agent, to settle that case for the sum of $9,500. Totally uncontradicted.

The plaintiff testified that he gave the attorney that authority. The attorney knew he had that authority. It was then, only some days after the carrier had cut a check or draft that apparently had been transmitted, that the plaintiff in that particular case went to another physician who somehow or another diagnosed that he had more problems as a result of that accident than the original doctors had seen, and at that particular point, he realized that if he was going to have a lot more medical expense, he ought not to settle.

Then he came in and indicated that he was not going to settle.

We don't have that situation here. The testimony has been from Mr. Eisenbeiss that he never gave express authority to his attorney to settle this case for $75,000.

THE COURT: Let's get to the crux of this matter.

You say this is a question of law or question of fact?

MR. BECKMAN: Well, obviously, Your Honor, you are going to have to listen to the facts and apply the law we are arguing right now.

THE COURT: I apply the facts to the law then.

Now, let's assume I don't believe that he didn't give -- that he did give Mr. Weil authority. What does that do to the legal principle that we have just talked about? Doesn't this matter really boil down to whether or not I choose to believe Mr. Eisenbeiss, or I do not choose to believe Mr. Eisenbeiss?

MR. BECKMAN: Your Honor, I think it boils down, really, in light of the situation in the Clark vs. Elza case, where there was absolutely no doubt in anybody's mind, there could be no doubt in anybody's mind because of the testimony of the Plaintiff, himself, that he gave his authority.

The problem that I intended to come across to the Court — I am not sure if you have the A.2d or the Md. App. up there, but the Court discusses this and indicates, "With respect to the question of the attorney's authority to settle a claim, we begin our analysis with a recognition of the general rule that there is a prima facie presumption that an attorney has authority to bind his client by his actions relating to the conduct of litigation." There are some cases quoted. However, the Court then goes on. "In Maryland, however, it is also well established that an attorney has no implied

authority to compromise his client's claim." Cases cited. "Express authority is required."

There is no question of express authority in the Clark case, because the plaintiff said, "Yes, I gave him, and I changed my mind afterwards."

In this case, the plaintiff does not say that. He indicates that he never, in fact, gave the express authority.

THE COURT: I understand that, and my question to you is assume I don't believe that, is that dispositive of this case?

MR. BECKMAN: It would certainly appear to be, Your Honor. There have been two appeals taken from the exact, more or less, factual situations. The appellate courts have treated it as a final order, regardless of which way it went, and it went one way in one and the other way in the other. Either side, I would suggest, would be fully able to take an appeal from the Court's decision in this particular motion.

THE COURT: Tell me why I should not enforce this agreement? And your sole ground is that he didn't authorize Mr. Weil to settle this case for $75,000?

MR. BECKMAN: Your Honor, we refer you again to Kinkaid. If there was no express authority, then there could be no way the Court could enforce the agreement. As a matter of fact, Your Honor, going back to the defendant, Mr. Weil was not even present here in the country, whenever the settlement

was made. That was Mr. Jacobs' own testimony.

THE COURT: That's not the crux of this case.

MR. BECKMAN: I understand that.

THE COURT: The crux of this case is whether or not he authorized -- the fact that he is out of the country doesn't make any difference. He can be in Timbuktu.

MR. BECKMAN: I understand that, Your Honor. I was getting to the next point, which was Mr. Jacobs' testimony.

Mr. Jacobs did not understand the case that well, had not been in the case, but it's my recollection of the testimony that when he transmitted this to him by Mr. Jacobs own testimony, and assuming -- and of course the client denies this, Mr. Eisenbeiss denies that he said yes, I will accept it, but assuming he said what Mr. Jacobs said he did, "I am happy, but I want the right to change my mind," that was no express authority, Your Honor, in any way, shape or form, as I see that by Mr. Jacobs' testimony alone.

Express authority is, "Yes, you have my authority to settle the case." There was obviously a qualification, even assuming Mr. Jacobs' testimony is correct.

THE COURT: I don't think Mr. Jacobs' testimony has anything to do with the legal issues. All it has to do is go to the burden of proof necessary in this case.

MR. BECKMAN: Which, of course, is on the moving party, Your Honor. That's why I brought it up.

THE COURT: I understand that. Go ahead.

MR. BECKMAN: That's all I have.

THE COURT: Anything else you want to tell me, Mr. Quinn?

MR. QUINN: I would just point out conferences, reference to Kinkaid and Cessna, that in that case, Your Honor, what the attorney said was that he misconstrued what he heard from his client, and he basically admitted, the attorney admitted in that case that he never had authorization from his client to settle the case. That's clearly set out, and that was the whole basis for the ruling in that case.

But that is not what the situation is here, because Mr. Weil has testified that he had the authority to settle this case, and proceeded on that express authority. Based on that, it's the basis for asking the Court to enforce this settlement agreement. Thank you.

THE COURT: Madam Clerk, this is a motion to enforce a settlement agreement which, in my judgment, is -- I don't know whether it's a legal problem or an equitable problem or a combination of both, because what the parties are asking me to do is to order somebody to live up to a particular contract that they purportedly entered into.

I really don't think it makes any difference whether it is legal or equitable, because, in my judgment, based on the law as I understand it to be, it involves a pure question of

agency and the relationship that exists between the attorney and his client in regards to the agency that was forthcoming, and I accept the fact that before a case can be settled in our state, that there must be express authority obtained from the client for that particular figure, or whatever the case may be, in order to properly adjudicate that matter or properly settle it.

In this case, there has been proffered to me testimony that extends for a period of months and months subsequent to the particular acts that they are complained of in this situation, and based on the totality of the evidence that has been presented to me, I am convinced, by a preponderance of the evidence, and I am also convinced by the fact—and I think it's unfortunate that plaintiff in this case has to have it decided by a Judge or somebody that is in an equal standing with the people that were forced to testify in this, and I don't think it would make any difference if it were some other Judge, but what the plaintiff is asking me to do is to disregard the testimony of people with whom I know their reputation in the community. I have worked with these people on a professional basis. These people still appear before me on the matters of law and whatever the case may be, and he is asking me not to accept their testimony, because it is, in fact, contrary to what he says the situation is, as it exists.

As a trier of the fact, I don't choose to do that.

That's my prerogative, and I choose in this case, and I find as a fact, that Mr. Weil had the authority, and that the amount of $75,000 was conveyed to the plaintiff who knew full well the extent of the negotiations, and knew full well of every step that was being done in this case.

I further find, as a fact, that this conference between the plaintiff and Mr. Jacobs, the $60,000 figure, never entered into that conference. What was conveyed by Mr. Jacobs, subsequently, was the figure of $75,000, and I choose to disbelieve everything that the plaintiff has testified to today, which is my prerogative, and I believe in total the testimony of Mr. Weil, the testimony of Mr. Jacobs, and the testimony of Mr. Zifchak.

Accordingly, the motion by the defendants to enforce the settlement is granted, and I think you need an order, gentleman. Give me an order.

(Whereupon, the above-entitled matter was concluded.)

APPENDIX (11) a.

VICTOR M. EISENBEISS, JR.

v.

JAMES HUBERT JARRELL et al.

In the
Court of Appeals
of Maryland

Petition Docket No. 482
September Term, 1982

(No. 176, September Term, 1982
Court of Special Appeals)
(Law No. 78192)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: February 3rd, 1983.

APPENDIX (ii) b.

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 176

September Term, 1982

VICTOR M. EISENBEISS, JR.

v.

JAMES HUBERT JARRELL, ET AL.

Wilner
Garrity
Adkins,

JJ.

Opinion by Wilner, J.

Filed: November 4, 1982

On November 4, 1977, appellant Eisenbeiss was involved in a motor vehicle collision with a truck driven by appellee Jarrell and owned by appellee Avis. On October 31, 1979, he sued Jarrell and Avis in the Circuit Court for Prince George's County to recover for the injuries suffered by him in the accident.

In his Declaration, appellant asked for damages of $1,000,000. After the customary pretrial discovery, as a trial date was growing nigh, the matter was set in for settlement conferences before the court. The first such conference, before Judge Blackwell, was held on January 5, 1981. At that conference, appellant reduced his demand to $200,000 and appellees offered $37,500. Judge Blackwell evaluated the case at $100,000. Trial was then set for February 23, but, as Judge Blackwell noted in a court memorandum "[n]egotiations are continuing and a follow-up settlement conference is set for February 6, 1981...."

The parties met again on February 6, before Judge Woods. At that conference, according to the court's memorandum of it, "[t]he demand was lowered to $100,000. The offer has not been increased from $37,500.00, but indications are that they would offer $50,000.00 to $60,000.00. It is unacceptable to Plaintiff." Trial was still scheduled for February 23, but, on February 25, 1981, it was taken out of the assignment and rescheduled for March 1, 1982, a continuance of over one year.

The first recorded explanation for this unusual event came on August 31, 1981, when appellees filed in the proceeding a

"Motion To Enforce Settlement." Appellees averred in their motion that

(1) As of February 20, 1991, appellant "through his counsel, had presented to the defendants, through their counsel, a demand of settlement in the amount of [$75,000] in return for which [appellant] would execute a general release and [the case] would be marked as settled and dismissed with prejudice";

(2) On or about February 20, 1981, appellees, through counsel, "met the settlement demand and agreed to pay to plaintiff the sum of [$75,000]" and that appellant, "through his counsel, confirmed that the case was settled";

(3) Trial of the case was scheduled for February 23, 1991, but "[f]ollowing the agreement of the parties, all parties, through their respective counsel, released all witnesses who had previously been placed under subpoena";

(4) On or about February 22, appellant's counsel advised appellees' counsel that "[appellant] desired to proceed to trial notwithstanding the settlement of the case which had been reached two days before. Counsel for all parties were in agreement that a valid settlement had been effected and the case would not proceed to trial";

(5) On February 23, counsel and appellant met with Judge Jacob S. Levin to apprise the court of the recent events. "In the course of that chambers conference, counsel for all parties again reconfirmed the fact and terms of the agreed settlement, but [appellant] apprised counsel and the Court that he had changed his

mind, and that the [$75,000] settlement, which he had previously authorized and had not, prior to acceptance, been withdrawn, was no longer enough." (Emphasis supplied); and

(6) Appellees tendered a draft for $75,000 and a proposed release but appellant refused to accept the draft, execute the release, and dismiss the case.

Upon these averments, appellees asked the court to order appellant to endorse the draft and to execute the release and the dismissal tendered to him.

Appellant, through new counsel, answered the motion on September 14, 1981. His defense was "that he never authorized his attorneys... to settle the above referenced matter for the sum of $75,000.00 and that the Plaintiff herein never agreed to the sum of $75,000.00 as full and final settlement of his claim against the Defendants herein as alleged in their Motion to Enforce Settlement." Appellant made no objection in his answer to the procedural device of a motion to enforce the alleged settlement agreement, as opposed to a separate action for specific performance. Nor, at the hearing held on the motion was such a defense raised. Indeed, at one point, in response to a question from the court about the "mechanics" of the matter, appellant's counsel conceded: "I agree wholeheartedly with [appellees' counsel] that the Court certainly does have the authority here to enforce or to order an enforcement of the settlement agreement."

The court conducted an evidentiary hearing on the motion on December 17, 1981. Appellant's former counsel (Mr.

Weil) and appellees' counsel both testified and confirmed that a settlement agreement had been reached as alleged in the motion, and that appellant had simply changed his mind after the agreement had been made and the witnesses released. Mr. Weil stated unequivocally that he had received authority from his client to make the demand of $75,000.[1] Appellees' counsel, in testifying about what occurred at the conference before Judge Levin, stated "as I recall it, [appellant] said that he had authorized Mr. Weil to accept, but now he didn't feel it was enough...."

Upon this testimony, the court found as fact that counsel had the requisite authority to settle the case for $75,000 and that an agreement had been reached to settle for that amount. Accordingly, on December 24, 1981, it issued an order directing appellant to accept the $75,000 and execute a release, failing which appellees could deposit the $75,000 with the court clerk and have the case dismissed with prejudice.

Appellant responded to the order on January 21, 1982, with (1) an order of appeal, (2) a motion for reconsideration, (3) a motion to strike the December 24 order, (4) a motion to revise that order, (5) a motion to stay the effect of the order, and (6) a motion to set the order aside. A hearing was requested on all the motions. Notwithstanding the extant order of appeal,

---

1. Counsel averred his authority at least twice in his testimony. On recross examination, he stated:

"Q Mr. Weil, concerning the $75,000, you have indicated, I believe in your prior testimony, that some point in time [appellant] had indicated that if he were able to get $75,000, you would settle the case, is that correct?

A That's correct. He said that he authorized me to accept $75,000 in settlement."

the court, on January 22, issued an order staying "the effect" of the December 24 order until "the matter for reconsideration is heard by the Hearing Judge." Such a hearing, on all the pending motions, was held on February 8, 1982, at which time the court denied all the motions. No further order was entered, however, revoking the January 22 stay of the December 24 order, or otherwise reinstating that December order, and no further order of appeal was filed.

In this appeal taken, we suppose, from the magically reinstated December 24 order, appellant complains:

> "I. The enforcement of an alleged settlement agreement in the amount of $75,000.00 on motion by a party to a civil suit, when there was no written settlement agreement and the non-moving party a[ff]irmatively states that his attorney did not have express authority to compromise the claim for $75,000.00, violates Article 23 of Maryland's Declaration of Rights which guarantees that 'the right of trial by jury of all issues of fact in civil proceedings in the several courts of law in this State, where the amount in controversy exceeds the sum of Five Hundred Dollars, shall be inviolably preserved.'
>
> * * *
>
> II. The enforcement of an alleged settlement in the amount of $75,000.00 on motion by a party to a civil suit, when there was no written settlement agreement and the non-moving party affirmatively states that his attorney did not have express authority to compromise the claim for $75,000.00, is improper because it does not conform with the requirements of the Maryland Rules of Procedure.
>
> * * *
>
> III. There was an error in the lower court when the trier of facts, sitting at a motion to enforce settlement hearing, ruled, based in part on the trier[']s prior knowledge of or contact with attorney witnesses who testified at the motion to enforce settlement proceeding.

IV. The affidavits of Beatrice E. Eisenbeiss and Victor M. Eisenbeiss, Jr. each of January 20, 1982, containing information important to the events surrounding the motion to enforce settlement hearing on December 17, 1981, are dispositive or material to the fact finding process of the lower court, with respect to the ruling by the lower court on the motion to enforce settlement.

V. The lower court, under Canon 13 of Rule 1231, had a duty or obligation to recuse itself from ruling on the motion to enforce settlement, when the lower court expressed what purported to be an apparent conflict with Rule 1231, Canon 13.

VI. A motion to enforce settlement is not an authorized procedure under the Maryland Rules of Procedure, or Maryland statutory or case law.

VII. The trial judge made a finding of fact which was dispositive of plaintiff's rights on the underlying tort, and in that the trial judge did so, the trial judge was bound to follow Rule 1231 Canon 13 as a trial rule, for the purposes of receiving evidence (testimony) and making rulings on that evidence."

Before addressing these various issues, we need to pause and consider a matter that appears to have been overlooked by the parties -- namely, the propriety of the court's January 22 order staying the effect of the December 24 order and the consequent validity of all proceedings in the circuit court occurring thereafter. The precise question is whether the court had any jurisdiction to enter the stay after an appeal to this Court had been noted.

Two basic, and intermeshing, principles are involved here: (1) A party has thirty days in which to note an appeal from a final judgment; and once such an appeal is noted, as a general rule the trial court's jurisdiction over the matter is

immediately suspended until the appeal is resolved; and (2) pursuant to Maryland Rule 625, a trial court has broad revisory power over its judgments for a period of thirty days. It is not uncommon for aggrieved litigants to do what appellant did here; i.e., to seek both forms of relief by noting an appeal to us and requesting a striking or revision of the judgment by the trial court.

In Tiller v. Elfenbein, 205 Md. 14 (1954), the Court of Appeals recognized that the concurrent pursuit of both remedial forms would necessarily create a gray area in terms of the trial court's continuing authority, and it laid down the following rules in order to reconcile the conflict: (1) the filing of an appeal does not preclude the appellant from also seeking revision of the judgment in accordance with Maryland Rule 625; (2) nor does the filing of a motion for such revision extend the time for filing an appeal or preclude the mover from timely noting an appeal. However, (3) "unless the appeal is dismissed when the motion comes on for hearing, the appellant must elect between his motion and his appeal. If the appeal is dismissed before the hearing... the motion stands for hearing as though no appeal has been entered." 205 Md. at 21.[2]

It was implicit from Tiller that, if the appeal was not dismissed prior to the scheduled hearing on the motion, the trial

---

2. That, indeed, is what occurred in Tiller, and thus the trial court was held to have had the jurisdiction to consider and act upon the motion for revision.

court would have no authority to hear or act on the motion. That implication was made clear in Visnich v. Wash. Sub. San. Comm., 226 Md. 589 (1961), where, in discussing Tiller, the Court said, at p. 590:

> "[W]e confirmed our prior holdings to the effect that the trial court lacks authority to entertain a motion to revise a judgment if an appeal is pending, and further stated that unless the appeal is dismissed when the motion to revise the judgment appealed from comes on for hearing, the appellant must elect between his motion and his appeal."

See also Gilliam v. Mooq Industries, 239 Md. 107, 112 (1965); Housing Equity Corp. v. Joyce, 265 Md. 570 (1972); McGinnis v. Rogers, 262 Md. 710 (1971).

The January 22 order was an obvious attempt to circumvent the required election. The court no doubt supposed that if the operation or effect of the December 24 order were stayed, there would be no final judgment, and thus appellant could proceed with his motions for revision without having to worry about pursuing his appeal. Such a supposition would have been well-founded if the stay had been ordered before appellant's appeal had been noted. See Hancock v. Stull, 199 Md. 434 (1952); Hanley v. Stulman, 216 Md. 461 (1958); Brown v. State, 237 Md. 492 (1965). See also S. & G. Realty v. Woodmoor Realty, 255 Md. 684, 692 (1969):

> "The cases make clear that one in the position of [appellant] must fish or cut bait. If he does not obtain a stay of the primary decree, he can appeal within thirty days of its date and still seek revision of the primary decree by the trial judge, provided that at the time the court acts on a timely motion for revision the appeal has been dismissed. ... Here the

> court acted on S. & G.'s petition for revision as S. & G. asked it to do and the court would have had no power to act had there been in effect when it did so an operative order of appeal." (Citations omitted; emphasis supplied.)

Once the appeal was noted, however, the court lost its authority to stay or suspend the operation or effect of the judgment. This is clear from what the Court of Appeals said in Bullock v. Director, 231 Md. 629, 633 (1963), and again in Lang v. Catterton, 267 Md. 268, 282 (1972):

> "An appeal to this Court from a nisi prius court does not necessarily stay all further proceedings in the trial court, nor does it strip said court of all power over the proceeding in which the appeal has been taken. The trial court may act with reference to matters not relating to the subject matter of, or affecting, the proceeding; make such orders and decrees as may be necessary for the protection and preservation of the subject matter of the appeal; and it may do anything that may be necessary for the presentation of the case in this Court, or in furtherance of the appeal. But, when an appeal is taken, it does affect the operation or execution of the order, judgment or decree from which the appeal is taken, and any matters embraced therein. After the appeal has been perfected, this Court is vested with the exclusive power and jurisdiction over the subject matter of the proceedings, and the authority and control of the lower court with reference thereto are suspended." (Emphasis supplied.)

Suspending or staying the "effect" of a final judgment after an appeal has been noted certainly affects "the subject matter of the proceedings." Such an order, if valid, would have the effect of divesting this Court of jurisdiction to entertain the appeal by annulling the finality of the judgment and thus would preclude appellate review. Rather than serving to protect and preserve the subject matter of the appeal, which the trial court is authorized to do,

that kind of order only frustrates the appeal, which the court is clearly not authorized to do.

Accordingly, we conclude that the court had no authority to issue the order of January 22, and that such order was therefore a nullity. From this it follows that, as the appeal noted on January 21 remained extant, the trial court had no jurisdiction to act upon the spate of motions seeking revision of the December 24 judgme

This brings us to the questions raised by appellant. Excising the rhetoric in them, it would appear that appellant is complaining about (1) the procedure employed to enforce the alleged settlement agreement, (2) the failure of the judge hearing the motion to recuse himself, and (3) the findings made by the court. None of the complaints has merit.

Questions I, II, and VI relate, at least in part, to the propriety of using a motion such as that filed by appellees to enforce an alleged settlement agreement. The simple answer to them is that appellant never made such a complaint to the trial court, and he will not be heard to make it for the first time on appeal. Maryland Rule 1085; cf. Clark v. Elza, 286 Md. 208, 210, n. 1 (1979); Kinkaid v. Cessna, 49 Md.App. 18, 21, n. 3 (1981). See, moreover, Eastern Environ. v. Industrial Pk., 45 Md.App. 512 (1980).

Cleared of their rhetorical verbiage, Questions I and II also attack the critical factual findings made by the court -- that appellant authorized his attorney, Mr. Weil, to settle the case for $75,000, and that a settlement agreement for that amount

was reached. Question IV, to some extent, also challenges those findings. The testimony of the two attorneys clearly supports the court's findings, however: and we therefore cannot say that they are clearly erroneous. Maryland Rule 1086.

Questions III, V, and VII suggest that Judge Levin, who heard and decided appellees' motion, had some duty under Maryland Rule 1231 to recuse himself. Not only was no request made of the judge to take such action, but, from the facts presented by appellant, we see no reason whatever why he should have done so. The complaint, in our judgment, is frivolous.

JUDGMENT AFFIRMED;
APPELLANT TO PAY THE COSTS.

APPENDIX (iii) a.

ORDER DATED DECEMBER 24, 1981 GRANTING THE MOTION OF DEFENDANTS TO ENFORCE SETTLEMENT (Filed January 4, 1982)

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VICTOR M. EISENBEISS, JR. :

Plaintiff :

vs. : Law No. 78,192

JAMES HUBERT JARRELL and AVIS RENT A CAR SYSTEM, INC. :

Defendants :

FILED

JAN 4 1982

CLERK OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MD.

O R D E R

It is this 24th day of December, 1981,

ORDERED, that the Motion of defendants To Enforce Settlement is GRANTED, and it is further

ORDERED,

1) That plaintiff, Victor M. Eisenbeiss, Jr., endorse and negotiate a Seventy-Five Thousand ($75,000.00) Dollar settlement draft tendered to him, through his counsel, and

2) That Victor M. Eisenbeiss, Jr., execute a general release in favor of James Hubert Jarrell and Avis Rent-A-Car System, Inc., which release will be tendered to Mr. Eisenbeiss through his counse,

3) That Victor M. Eisenbeiss, Jr., through his counsel, execute and file with the Court a Line marking Law Number 78,192 as Settled and Dismissed With Prejudice, and it is

FURTHER ORDERED, that in the event that plaintiff, Victor M. Eisenbeiss, Jr. fails to perform all of the foregoing acts set out above in paragraphs 1, 2 and 3 within fifteen (15) days of the date of this Order, then defendants shall file the sum of Seventy-Five Thousand ($75,000.00) Dollars with the Clerk of the Court in settlement of this case, and upon receipt of same, the case is to be entered as "Settled and Dismissed With Prejudice".

JACOB S. LEVIN, Judge
Circuit Court for Prince George's County, Maryland

APPENDIX (iii) b.

TRANSCRIPT OF PROCEEDINGS DATED FEBRUARY 8, 1982

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VICTOR M. EISENBEISS, JR., PLAINTIFF	:	
-VS-	:	LAW 78.192
JAMES HUBERT JARRELL AND AVIS RENT-A-CAR, INC., DEFENDANTS	:	

ALL PENDING MOTIONS

COUNTY COURTHOUSE
COURTROOM NO. 1
UPPER MARLBORO, MD 20772
FEBRUARY 8, 1982

BEFORE THE HONORABLE JACOB S. LEVIN, ASSOCIATE JUDGE

APPEARANCES:

VAN S. POWERS, ESQUIRE
ON BEHALF OF THE PLAINTIFF

HENRY WEIL, ESQUIRE
RONALD S. CANTER, ESQUIRE
WILLIAM N. ZIFCHAK, ESQUIRE
ON BEHALF OF THE DEFENDANTS

REPORTED BY:

EUGENE A. HAYDEN, JR.
OFFICIAL COURT REPORTER
P.O. BOX 401
UPPER MARLBORO, MD 20772

THE CLERK: LAW 78.192, EISENREISS, JR. -VS- JARRELL.

MR. POWERS: GOOD MORNING, YOUR HONOR.

THE COURT: ALL RIGHT. DID YOU CALL THE CASE?

THE CLERK: YES, YOUR HONOR.

THE COURT: TELL ME WHY WE ARE HERE, MR. POWERS.

MR. POWERS: YOUR HONOR, AS THE COURT KNOWS, IN THIS CASE, IT WAS A HEARING ON DECEMBER 17, 1981 ON A MOTION TO ENFORCE A SETTLEMENT, FILED BY AVIS AND JARRELL, THE DEFENDANTS IN THE CASE. ON DECEMBER 24, 1981 A COURT ORDER WAS PASSED IN WHICH THE COURT GRANTED THE MOTION TO ENFORCE SETTLEMENT. AFTER DECEMBER 24, 1981 THE MOTHER OF THE PLAINTIFF INDICATED THAT SOME INFORMATION HAD BECOME -- COME INTO HER ATTENTION THAT SEEMED TO INDICATE THAT THE COURT SHOULD NOT HAVE RULED THE WAY IT DID ON DECEMBER 24, 1981.

AFTER THAT DATE, AND BASED ON THAT INFORMATION, THE PLAINTIFF HAS FILED A NUMBER OF MOTIONS TO ATTEMPT TO SEEK TO HAVE A REHEARING ON THE MATTER, OR AT THE VERY LEAST TO HAVE THE DECEMBER 24, 1981 ORDER STRICKEN.

THE PLAINTIFF IS PREPARED, IF THE COURT IS SO INCLINED TO HEAR TESTIMONY ON THIS ISSUE, TO PRESENT TESTIMONY. HOWEVER, THE TESTIMONY THAT WOULD BE PRESENTED IS SET FORTH IN THE AFFIDAVIT THAT IS SUPPORTED BY ONE OF THE MOTIONS FILED BY THE PLAINTIFF.

NOW, JUDGE REA SIGNED THE MOTION TO STAY THE

PROCEEDINGS. OR THE EFFECT OF THE DECEMBER 24, 1991 ORDER. AND IT WOULD APPEAR TO THE PLAINTIFF, YOUR HONOR, THAT IF THE COURT WOULD BE INCLINED TO DO SO, THAT ANOTHER MEMBER OF THE COURT SHOULD HEAR THE PENDING MOTIONS.

THE COURT: ANYTHING ELSE YOU WANT TO SAY?

MR. POWERS: NO, SIR.

THE COURT: ALL RIGHT. ALL THE MOTIONS IN THAT CASE ARE DENIED. TO RECONSIDER ANY OTHER THING IN HERE THAT YOU FILED. MOTION TO STRIKE ORDER. MOTION FOR RECONSIDERATION AND MOTION TO REVISE ORDER. THEY ARE ALL DENIED.

ANYTHING FURTHER?

MR. POWERS: NOT BASED ON THAT RULING, YOUR HONOR.

THE COURT: ALL RIGHT. AND ONE OTHER, FURTHER THING, FOR THE RECORD, MR. POWERS, THE AFFIDAVIT OR WHATEVER WAS FILED ON BEHALF OF THE PLAINTIFF, IS A FIGMENT OF HER IMAGINATION. AND LASTLY, IN SEVEN YEARS I HAVE NEVER BEEN ACCUSED OF ACTING IMPROPERLY AND I DEEPLY RESENT IT.

ALWAYS A PLEASURE TO SEE YOU GENTLEMEN.

MR. WEIL: I HAD FILED, I THOUGHT IT WAS TO BE SCHEDULED THIS MORNING, A MOTION TO INTERVENE IN THE PENDING LITIGATION. APPARENTLY MR. POWERS HAS FILED, ON BEHALF OF THE PLAINTIFF, AN APPEAL TO THE COURT OF SPECIAL APPEALS SIMULTANEOUS WITH THE FILING OF THESE MOTIONS.

THE COURT: I DON'T KNOW HOW THIS GOT HERE. ONCE A FILING OF AN APPEAL IS DONE IT STAYS ANYTHING I CAN DO IN THIS

CASE, AND HOW ANYTHING ELSE WAS DONE IN THIS CASE, TO BE HEARD, IS BEYOND MY BELIEF. OF COURSE, ANYTHING IN THIS CASE I BELIEVE. I BELIEVE ANYTHING CAN HAPPEN, AS IT HAS HAPPENED.

WHAT DID YOU WANT ME TO RULE ON, MR. WEIL?

MR. WEIL: I WANTED THE COURT TO CONSIDER THE MOTION, MY MOTION AND THE MOTION OF MY FIRM TO INTERVENE IN THESE PROCEEDINGS, PENDING ANY APPEAL. AND I WOULD ALSO, AT THIS TIME, ASK THE COURT TO SET A SUPERSEDEAS BOND IN THIS CASE BECAUSE WE HAVE A VERY SUBSTANTIAL STAKE IN THESE PROCEEDINGS AT THIS POINT, AND IF THE PLAINTIFF WANTS TO APPEAL, I THINK A SUPERSEDEAS BOND WOULD BE APPROPRIATE IF HE WANTS THE COURT TO STAY THE OPERATION OF YOUR ORDER OF DECEMBER 17.

THE COURT: I DON'T KNOW WHY A SUPERSEDEAS BOND IS NECESSARY IN THIS CASE, MR. WEIL. ALL I DID WAS DEPOSIT THE MONEY IN THE REGISTRY OF THE COURT AND SAY THAT THEIR CASE IS OVER WITH, THAT IN MY JUDGMENT THE PLAINTIFF HAD AUTHORIZED HIS ATTORNEYS TO SETTLE THIS CASE AND ACCORDINGLY THERE WAS A CONTRACT ENTERED INTO BETWEEN THE PLAINTIFFS AND THE DEFENDANTS, AND THE MONEY IS IN THE REGISTRY OF THE COURT.

NOW, TELL ME WHY THEY HAVE TO FILE A SUPERSEDEAS BOND.

MR. WEIL: THE MONEY WILL SIT IN A NON-INTEREST BEARING ACCOUNT.

THE COURT: I WILL SEE THAT IT SITS IN AN INTEREST BEARING ACCOUNT. ALL RIGHT? I WILL TAKE CARE OF THAT. YOU WANT

ME TO MODIFY THE ORDER TO MAKE IT INTEREST BEARING? I WILL DO THAT.

MR. WEIL: I WOULD ASK THE COURT TO CONSIDER THAT.

THE COURT: ALL RIGHT. HAVE YOU ALL FILED THE MONEY IN THE REGISTRY?

MR. CANTER: NO, YOUR HONOR.

MR. ZIFCHAK: YOUR HONOR, THE CHECK HAS BEEN IN MR. WEIL'S CUSTODY.

THE COURT: MR. WEIL'S CUSTODY. POST IT IN THE REGISTRY OF THE COURT IN AN INTEREST BEARING ACCOUNT.

GENTLEMEN, ANYTHING ELSE? ALWAYS A PLEASURE TO SEE YOU GENTLEMEN.

---000---

APPENDIX (iv)

MOTION FOR RECONSIDERATION (Filed January 21, 1982)

78192

(87)

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VICTOR M. EISENBEISS, JR.	:	
Plaintiff	:	
v.	:	Law No. 78,192
JAMES HUBERT JARRELL	:	
AND	:	
AVIS RENT A CAR SYSTEM, INC.	:	
Defendants	:	

FILM

FILED

JAN 21 1982

CLERK OF THE CIRCUIT COURT FOR PRINCE GEORGES COUNTY, MD.

MOTION FOR RECONSIDERATION

Plaintiff Victor M. Eisenbeiss, Jr., by and through his counsel, and pursuant to appropriate Maryland Rules of Procedure, moves the Court to reconsider the Order of December 24, 1981, filed January 4, 1982, in these proceedings and for reason states as follows:

1. Pursuant to Order of Court of December 24, 1981, filed January 4, 1982, in these proceedings the plaintiff was ordered to endorse and negotiate a settlement draft tendered to his former counsel; to execute a general release in favor of the defendants; and further, to execute and file with the Court a Line marking Law Number 78,192 as Settled and Dismissed with Prejudice;

2. Plaintiff has retained new counsel in these proceedings and asserts several and various, legal and equitable claims and defenses which are substantial and which ought to be heard by the Court in the interests of justice;

3. It is of extreme importance ot Victor M. Eisenbeiss, Jr. to have reconsideration of this order due to the fact that his injuries are so severe and substantial, and that his underlying tort action is his only remedy to correct his substantial damages and losses;

4. The plaintiff has contended throughout that he never authorized a settlement of the underlying tort action in these proceedings at the amount of seventy-five thousand dollars ($75,000.00);

5. That plaintiff was not aware of, and did not have the benefit of all procedural and substantive rights due him before the hearing of December 17, 1981, in that the issue of whether a settlement (contract) had occurred, could be tried in a manner as other contract actions could be tried;

6. The above captioned matter originally was a tort action and was commenced on the Law side of the Court under the above captioned Law Number, however, the Court on December 17, 1981, and again on December 24, 1981, acted as a Court of Equity in ruling on the Motion of defendant to Enforce Settlement, granting specific, equitable relief;

7. The Court on December 17, 1981, and on December 24, 1981, sitting as a Court of Equity, ruled improperly and without legal support or justification so as to deprive the plaintiff of legal rights and remedies on the underlying tort action;

8. The Court should not have granted Equitable relief on December 24. 1981, to the defendants in the Law action, without a Bill of Complaint or Petition in an Equity matter at least having been commenced by the defendants on the issue of settlement (contract) which is a separate, distinct matter from plaintiff's underlying tort action;

9. Plaintiff has newly discovered evidence, with respect to the impartiality of the trier of facts on the Motion of Defendant to Enforce Settlement, which evidence was not available to plaintiff counsel at the time of the hearing on defendants' motion which was had on December 17, 1981;

10. Plaintiff has certain other evidence with respect to the bias and partiality of the trier of facts on the Motion of Defendant to Enforce Settlement, which evidence was discovered in the course of the hearing on said motion which was had on December 17, 1981;

11. Plaintiff has submitted this information to counsel and said information is the subject of pleadings, documents, and affidavits filed in these proceedings in support of this and other motions;

12. The reconsideration of the Order of December 24, 1981, would not, in any way, be prejudicial to, or otherwise prejudice, the rights of the defendants, particularly with respect to the rights and liabilities existing within the underlying tort action;

13. Plaintiff submits that oral argument on this motion is appropriate and that his assertions and evidence would likely cause the Court to Reconsider its Order of December 17, 1981, and subsequently vacate said Order.

WHEREFORE, plaintiff, Victor M. Eisenbeiss, Jr., having set forth the above in support of the Motion for Reconsideration the Order of Court of December 24, 1981, filed January 4, 1982, respectfully requests the Court to:

1. Reconsider the Order of Court of December 24, 1981, filed January 4, 1982, in these proceedings; and,

2. Rescind and vacate said Order of Court; or in the alternative,

3. Order that additional argument and testimony be permitted relative to Motion of defendants to Enforce Settlement; and,

4. Order that a hearing on this Motion, as well as any other Motions filed by the plaintiff addressing these issues, be had in open Court.

Respectfully Submitted,

Van S. Powers
Attorney for Plaintiff
4344 Farragut Street
Hyattsville, Maryland 20781
277-3311

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of January, 1982, a copy of the foregoing Motion for Reconsideration was mailed postage prepaid to:

1. Francis X. Quinn, Esquire
   25 Wood Lane
   Rockville, Maryland 20850;

2. John E. Beckman, Jr., Esquire
   7676 New Hampshire Avenue
   Langley Park, Maryland 20783;

3. William N. Zifchak, Esquire
   P.O. Box 550
   Upper Marlboro, Maryland 20772; and

4. Henry Weil, Esquire
   Harvey Jacobs, Esquire
   One Central Plaza, No. 10 S.W.
   11300 Rockville Pike
   Rockville, Maryland 20852.

FILED

Van S. Powers

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION (Filed January 21, 1982)

78192

(88)

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VICTOR M. EISENBEISS, JR. :

Plaintiff :

v. : Law No. 78,192

JAMES HUBERT JARRELL :

AND :

AVIS RENT A CAR SYSTEM, INC. :

Defendants :

FILED

JAN 21 1982

CLERK OF THE CIRCUIT COURT
FOR PRINCE GEORGES COUNTY, MD.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION

1. Rule 625 a., Maryland Rules of Procedure.

> For a period of thirty days the entry of a judgment, or thereafter pursuant to motion filed within such period, the court shall have revisory power and control over such judgment. After the expiration of such period the court shall have revisory power and control over such judgment, only in case of fraud, mistake or irregularity.

2. Within the thirty day period stated in the rule, there is no need to demonstrate fraud, mistake or irregularity, rather, the motion is directed to the sound discretion of the trial court. Eshelman Motors Corp. v. Scheftel, 281 Md. 300, 189 A.2d 818 (1962). The trial court should exercise that sound discretion if the movant shows reasonable indication of meritorious defense or other equitable circumstances to justify striking the judgment. Abarms v. Gav Inv. Co., 253 Md. 121, 251 A.2d 876 (1969) and Cromwell v. Ripley, 11 Md. App. 173, 273 A.2d 218 (1971).

In this case, serious issues concerning the settlement authority of plaintiff's attorneys and the method of resolution of the dispute surrounding the alleged settlement of plaintiff's claim have been raised. For example, see Chertkoff v. Harry C. Weiskittel Co., 251 Md. 544, 248 A.2d 373 (1968).

3. Maryland Rules of Procedure 1231 deals with Canons and Rules of Judicial Ethics and the Preamble in the text of Rule 1231 states. "The Canons and Rules of Judicial Ethics, as herein set forth, are adopted as rules of this

Court governing the conduct of all Judges referred to in Rule 13 of the Rules of Judicial Ethics." Rule 13 in the text describes Circuit Courts of the Counties as being Courts encompassed by Rule 1231. The 1981 supplement of Rule 1231 contains Rule 14 a. which also indicates that the Circuit Courts for the Counties were designed to come within Rule 1231. Rule 1231 under Canon Number 13 titled Kinship or Influence, the Canon states as follows, "A Judge should not act in a controversy in which a near relative is party, witness, or lawyer; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position, or influence of any party or other person. He should not testify voluntarily as a character witness." Under Canon 22 titled Social Relations within Rule 1231 it is stated, "It is not necessary to the proper performance of judicial duty that a Judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the bar. He should, however, inpending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct."

Since this preamble to Rule 1231 in the text clearly states that Rule 1231 containing the Canons and Rules of Judicial Ethics are adopted as "Rules of this Court", the Canons and Rules contained within Rule 1231 act, in effect, as rules governing the trial of cases and other proceedings in the Circuit Courts of the Counties, and in this case, Rule 1231 and the Canons and Rules thereunder govern the conduct of the motion heard on December 17, 1981.

If, factually, the statement referred to in the supporting Affidavit of Beatrice E. Eisenbeiss was made by the trier of the facts (trial Judge) on the

Motion to Enforce Settlement heard on December 17, 1981, then Canon 13 and/or Canon 32 concerning Social Relations were violated. If the rules of the conduct of the trial under Rule 1231 were not followed, then the trial of the proceedings or hearing of the motion on December 17, 1981 resulted in a decision which should be reversed, in that the Court's decision resulting from the hearing of December 17, 1981, had the effect of depriving Victor M. Eisenbeiss, Jr., from a trial on the underlying tort for which the above action was originally brought.

In this regard see 65 Op. Att'y Gen. (May 8, 1980) which indicated that "The Canons of Judicial Ethics do not have the same operative or legal status as do the rule of judicial ethics, in governing the activities of Judges."

Victor M. Eisenbeiss, Jr. contends only that Rule 1231 and the Canons and Rules thereunder act as do other rules of procedure in Maryland to govern the trials of cases and hearings of motions (which in this case the December 17, 1981 proceeding was a hearing of a motion) and as such Rule 1231 mandates that the trier of the fact on a particular motion (in this case a trial Judge) be completely free of any influence or impression of bias in order to accurately receive testimony in evidence and make factual findings and apply law in a particular proceeding.

The trial Court's finding in this situation deprived Victor M. Eisenbeiss, Jr. of his right to have a full trial by jury on the underlying tort action which was the original cause of action followed by the Motion to Enforce Settlement in this proceeding.

Under section 347 A describing this conduct of the Court or of counsel, a party may use the principals discussed in Poe's Pleading and Practice, 6th Ed., to support the proposition that the trier of facts should be impartial and if impartiality is not exercised then a new trial or hearing should be granted. At page 676 of Poe's Pleading and Practice, 6th Ed., section 347 A it is stated, "Still there are cases upon record where the Judge, upon having his attention fearlessly, yet respectfully, called to the breach of judicial

propriety complained of, has manfully acknowledged his fault, and atoned for it by granting a new trial." At page 677 the inquiry follows, "The point of inquiry will always be this: did the objectionable conduct of the Court really influence the jury in the finding of their verdict? If it did, or if it was fairly and reasonably calculated to influence them, then a verdict thus brought about should not be allowed to stand. All this seems plain enough, so far as concerns the statement of the doctrine. The difficulty is in determining whether the facts bring the particular case within its fair application, and perhaps the nearest approach we can make to any definite statement is, that if the alleged misconduct had a reasonable tendency to interfere with a fair decision of the case on its merits, then a new trial should be ordered, and the determination of this question must be left in each case to the just and enlightened discrimination of the Court." Further, it is stated, at page 677, "If misconduct includes an impropriety, as in effect it would, there have been some adjudications by the Court as to what does or does not constitute an improper remark or improper conduct on the part of the Court or counsel which should now be reviewed."

At page 677 at the second full paragraph it is stated, "Improprieties by the Court. A trial Judge, because of his high and authoritative position, should be exceedingly careful in any remarks made by him during the progress of a trial, either in passing upon evidence or ruling upon prayers; he should carefully refrain, either directly or indirectly, from giving expression to an opinion upon the existence or not of any fact which should be left to the finding of the jury; yet it has frequently been said that a Judge may at any time during the trial modify his instructions or revoke them altogether, if convinced of error in a previous ruling."

It appears that, after reviewing the authorities in this area, a trial Court, in this case, should not have sat in judgment of the Motion to Enforce Settlement, if, in fact, the statement as alleged by Beatrice E. Eisenbeiss

were made before the Motion to Enforce Settlement began. The propositions concerning conduct of the trial before a jury should hold, in substance, for proceedings on motions, especially when the outcome of those motions are finally determinative or adjudicative of substantial rights of the party.

Remarks of counsel are customarily monitored by the Court so as not to allow improper influence upon the trier of the facts. At page 682 of Poe's Pleading and Practice, 6th Ed., Section 347 A, third full paragraph, it is stated, "Generally an improper comment, when it constitutes an impropriety, may be corrected by a cautionary warning of the Court and an instruction to the jury that it should decide the case on the evidence and not the remarks of counsel, or someother cautionary instruction to the end that the jury will be instructed that the remark is to be disregarded." It appears that the trier of the facts must be impartial in order to allow fairness to be part of the proceeding as well as part of the result or decision of the trier of the facts.

In Elmer v. State at 239 Md. 1, 209 A.2d 776 (1965) the modes of preserving the question of allegedly improper remarks of the trial Judge for Appellate consideration and the Appellate Court's ruling were stated. So this indicates there is a process for at least remarks of the trial Court during trials. The same application or principals should be available when a motion determinative of the final outcome of the proceedings is the issue. This is the case before the Court at this time.

Respectfully Submitted,

Van S. Powers
Attorney for Plaintiff
4344 Farragut Street
Hyattsville, Maryland 20781
277-3311

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of January, 1982, a copy of the foregoing Memorandum of Points and Authorities in Support of Motion For Reconsideration was mailed postage prepaid to:

1. Francis X. Quinn, Esquire
   25 Wood Lane
   Rockville, Maryland 20850;

2. John E. Beckman, Esquire
   7676 New Hampshire Avenue
   Langley Park, Maryland 20783;

3. William N. Zifchak, Esquire
   P.O. Box 550
   Upper Marlboro, Maryland 20772; and

4. Henry Weil, Esquire
   Harvey Jacobs, Esquire
   One Central Plaza, No. 185
   11300 Rockville Pike
   Rockville, Maryland 20852.

Van S. Powers

MOTION TO STRIKE ORDER OF COURT OF DECEMBER 24, 1981 (Filed January 21, 1982)

78192 (92)

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VICTOR M. EISENBEISS, JR.

Plaintiff

-vs-

JAMES HUBERT JARRELL
and
AVIS RENT-A-CAR SYSTEM, INC.

Defendants

Law No. 78,192

FILED

JAN 21 1982

CLERK OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MD.

MOTION TO STRIKE ORDER OF COURT OF DECEMBER 24, 1981

The plaintiff in these proceedings Victor M. Eisenbeiss, Jr. by and through his attorney, moves to strike an Order of the Prince George's County Circuit Court dated December 24, 1981 and states as follows the reasons for the Motion to Strike Order of Court of December 24, 1981:

1. On December 17, 1981 a hearing on a Motion to Enforce Settlement was held before Judge Levin in courtroom one in Prince George's County Circuit Court;

2. On December 24, 1981 an Order of Court was signed by Judge Levin ordering a settlement, in effect,of the underlying tort case which was captioned as stated above;

3. The plaintiff has caused a Motion to Revise Order of Court dated December 24, 1981 under Maryland Rule 625 to be filed in these proceedings;

4. The plaintiff has contended throughout that he never authorized a settlement of the underlying tort action in these proceedings at the amount of seventy-five thousand dollars ($75,000.00);

5. The plaintiff did not have the benefit of all of his procedural and substantive rights before the hearing on December 17, 1981, in that the issue of whether a settlement (contract) had occurred, could be tried in a manner as other contract actions could be tried.

6. The plaintiff has requested the Prince George's County Circuit Court to entertain a Motion pursuant to Maryland Rule 625 to Revise the Order of Court of December 24, 1981 to the extent that alternatives would be available to the Court to insure that the plaintiff as well as other parties received the benefits of all procedural and substantive rights, as in other contract actions, in these proceedings;

7. After the December 17, 1981 hearing on the Motion to Enforce Settlement, the plaintiff elected to obtain additional legal opinion concerning his rights and remedies in these matters;

8. The plaintiff was unaware, prior to consultation with his present counsel, of certain procedural and substantive rights that he had concerning contract actions and was unaware that a settlement issue is tantamount to a contract issue; the plaintiff has been informed by his present counsel that if a settlement (contract) issue was before the Court, then the plaintiff had the right to a trial by Court or jury on the issue of whether a contract existed, which would give rise to a settlement of the proceedings; in addition, plaintiff became aware of the importance and impact of certain matters, more fully described in the Motion to Revise pursuant to Maryland Rule 625, with those issues having a determinative effect on the trier of facts at the December 17, 1981 Motion to Enforce Settlement hearing;

9. The plaintiff has elected to alternatively request relief from the December 24, 1981 Order of Prince George's County Circuit Court, which, in effect, terminates the plaintiff's rights, claims, and contentions on the underlying tort matter which is the subject of the above-captioned proceeding pending in the Prince George's County Circuit Court;

10. The Court on December 17, 1981 and again on December 24, 1981, acted, as a Court of Equity in ruling on the Motion to Enforce Settlement;

11. The above-captioned matter originally was a tort action and was commenced on the Law side of the Court under the above-captioned Law number; the

(3)

Court, on December 24, 1981 sitting as a Court of Equity, granting Equitable relief, in the form of a Court Order granting the Motion to Enforce Settlement, ordered the specific performance of certain described activities (as set out in the Court Order of December 24, 1981) of the plaintiff; additionally, the Court Order of December 24, 1981 ordered that, absent performace by the plaintiff by a stated number of days after the Order of December 24, 1981, certain contingent activities should occur, that would, in effect, have a result of terminating forever the plaintiff's rights concerning the underlying tort action;

12. The Court on December 24, 1981 sitting as a Court of Equity ruled improperly and without legal support or justification so as to deprive the plaintiff of legal rights and remedies on the underlying tort action;

13. The Court on December 24, 1981 sitting as a Court of Equity and decreeing specific performance actually granted Equitable relief to the defendants in the Law action as captioned above;

14. The Court should not have granted Equitable relief on December 24, 1981 to the defendant in the Law action, without a Bill of Complaint or Petition in an Equity matter as least having been commenced by the defendant on the issue of settlement (contract);

15. In addition, plaintiff has advised the Court of the evidence now available with respect to the impartiality of the trier of the facts on the Motion to Enforce Settlement and this imformation is the subject of pleadings, documents, and affidavits filed in these proceedings in support of Motion to Revise under Rule 625 and Motion for Reconsideration filed in these matters.

WHEREFORE, the plaintiff having set forth the above in support of the Motion to Strike Order of Court of December 24, 1981 the plaintiff respectfully request the Court to:

1. Order a hearing on this Motion as well as any other Motions filed by this plaintiff addressing these issues;

2. Strike the Order of Court dated December 24, 1981;

3. Grant an Order allowing the plaintiff to pursue contract remedies, if

any, at Law or in Equity, on the original causes of action filed in the above-captioned proceedings;

4. Grant costs in favor of plaintiff in these matters.

Respectfully submitted,

FILM

Thomas F. Kennedy
Attorney for Plaintiff, Victor M. Eisenbeiss, Jr.
4344 Farragut Street
Hyattsville, Maryland 20781
301-277-3311

Van S. Powers
Attorney for Plaintiff, Victor M. Eisenbeiss, Jr.
4344 Farragut Street
Hyattsville, Maryland 20781
301-277-3311

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Strike Order of Court of December 24, 1981, was mailed postage prepaid, to Francis X. Quinn, Esquire at 25 Wood Lane, Rockville, Maryland 20850, Karl Feissner, Esquire, at 7676 New Hampshire Avenue, Suite 406, Langley Park, Maryland 20783, John E. Beckman, Jr. at 7676 New Hampshire Avenue, Suite 406, Langley Park, Maryland 20783, William N. Zifchak, Esquire, at P.O. Box 550, Upper Marlboro, Maryland 20722, Henry E. Weil, Esquire and Harvey Jacobs, Esquire, at One Central Plaza, Rockville, Maryland 20852, this 21st day of January, 1982.

Van S. Powers

Thomas F. Kennedy

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE ORDER OF COURT OF DECEMBER 24, 1981 (Filed January 21, 1982)

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VICTOR M. EISENBEISS, JR. :

Plaintiff :

v. : Law No. 78,192

JAMES HUBERT JARRELL :

AND :

AVIS RENT A CAR SYSTEM, INC. :

Defendants :

FILED (FILM)

JAN 21 1982

CLERK, CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MD.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE ORDER OF COURT OF DECEMBER 24, 1981

1. Rule 625 a., Maryland Rules of Procedure.

For a period of thirty days after the entry of a judgment, or thereafter pursuant to motion filed within such period, the court shall have revisory power and control over such judgment. After the expiration of such period the court shall have revisory power and control over such judgment, only in case of fraud, mistake or irregularity.

2. "Rule 1 of subdivision VI, Part Two of the Rules of Practice and Procedure provides: "For a perioF of thirty (30) days after the entry of any judgment, order or decree, final in its nature, or thereafter pursuant to motion filed within such period, the Court shall have the same revisory power and control over such judgment, order or decree as it had during the term at which it was entered under the practice heretofore existing. ***" Both before and after the adoption of this rule, we have held that the court's action on a timely motion to strike, before a judgment is enrolled, is discretionary and not appealable. Corbin v. Jones, 199 Md. 527, 86 A.2d 911; 588. Moreover, it has been held that the trial court, within the term, may reconsider its action on a motion to strike." (underline added).

Tiller v. Elfenbein, 205 Md. 14, 106 A.2d 42 (1954) at 106 A.2d 44.

Respectfully Submitted,

Van S. Powers

Van S. Powers
Attorney for Plaintiff
4344 Farragut Street
Hyattsville, Maryland 20781
277-3311

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of January, 1982, a copy of the foregoing Memorandum of Points and Authorities in Support of Motion to Strike Order of Court of December 24, 1981 was mailed postage prepaid to:

1. Francis X. Quinn, Esquire
   25 Wood Lane
   Rockville, Maryland 20850;

2. John E. Beckman, Jr., Esquire
   7676 New Hampshire Avenue
   Langley Park, Maryland 20783;

3. William N. Zifchak, Esquire
   P.O. Box 550
   Upper Marlboro, Maryland 20772; and

4. Henry Weil, Esquire
   Harvey Jacobs, Esquire
   One Central Plaza, No. 105 W.
   11300 Rockville Pike
   Rockville, Maryland 20852.

Van S. Powers

MOTION TO REVISE UNDER RULE 625
(Filed January 21, 1982)

78192

(95)

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VICTOR M. EISENBEISS, JR. :

Plaintiff :

v. : Law No. 78,192

JAMES HUBERT JARRELL :

AND :

AVIS RENT A CAR SYSTEM, INC. :

Defendants :

FILM

FILED

JAN 21 1982

CLERK CIRCUIT COURT
FOR PRINCE GEORGES COUNTY, MD.

MOTION TO REVISE UNDER RULE 625

The plaintiff, Victor M. Eisenbeiss, Jr., by and through his counsel Van S. Powers and Thomas F. Kennedy, move this Honorable Court to revise, pursuant to Maryland Rule 625, an Order of Court dated December 24, 1981, among other things, granting defendants' Motion to Enforce Settlement, and for reasons states the following:

1. On December 17, 1981 before Judge Jacob S. Levin a hearing was held on a Motion to Enforce Settlement and Answer to Motion to Enforce Settlement;

2. The Motion to Enforce Settlement was granted on December 17, 1981;

3. An Order was signed December 24, 1981 requiring Victor M. Eisenbeiss, Jr. to endorse and negotiate a settlement draft, execute a general release, and execute and file, through his counsel, a Line marking Law Number 78, 192 as Settled and Dismissed with Prejudice;

4. The December 24, 1981 Order required the defendants to file funds with the Clerk of the Court in settlement of the case, if Victor M. Eisenbeiss, Jr. failed to perform acts set out in the Order;

5. Victor M. Eisenbeiss, Jr. has caused to be filed a Motion for Reconsideration, with supporting documents and/or pleadings and Proposed Order, a Motion to Revise Under Rule 625, with supporting documents and/or pleadings,

and Proposed Order, and a Motion to Stay Effect of Order of December 24, 1981, with supporting documents and/or pleadings, and Proposed Order, and a Motion to Strike the Order of Court of December 24, 1981, with supporting documents and/or pleadings and Proposed Order;

6. The December 24, 1981 Order should be revised so as to not require Victor M. Eisenbeiss, Jr. to do those acts stated under the Order and so as to deny the relief as requested by the defendants and so as to allow Victor M. Eisenbeiss, Jr. to have a trial on the underlying causes of action which were originally filed in the above captioned case;

7. The December 24, 1981 Order acted to deprive Victor M. Eisenbeiss, Jr. of his rights to have a jury trial on his claims for damages for substantial injuries resulting from a collision November 4, 1977;

8. Victor M. Eisenbeiss, Jr. contends he has never agreed to accept $75,000.00 in settlement of his claims;

9. Victor M. Eisenbeiss, Jr. wants a jury trial on his claims in the above captioned case;

10. Victor M. Eisenbeiss, Jr. was not given a fair and impartial hearing on the issue of enforced settlement on December 17, 1981, from which the Order of December 24, 1981 resulted.

WHEREFORE, Victor M. Eisenbeiss, Jr. respectfully requests the Court to hear these matters as expeditiously as possible.

Respectfully Submitted,

Van S. Powers
Attorney for Plaintiff
4344 Farragut Street
Hyattsville, Maryland 20781
277-3311

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of January, 1982 a copy of the foregoing Motion to Revise Under Rule 625 was mailed postage prepaid to:

1. Francis X. Quinn, Esquire
   25 Wood Lane
   Rockville, Maryland 20850;

2. John E. Beckman, Esquire
   7676 New Hampshire Avenue
   Langley Park, Maryland 20783;

3. William N. Zifchak, Esquire
   P.O. Box 550
   Upper Marlboro, Maryland 20772; and

4. Henry Weil, Esquire
   Harvey Jacobs, Esquire
   One Central Plaza, No. 105 W.
   11300 Rockville Pike
   Rockville, Maryland 20852.

FILM

Van S. Powers

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO HAVE UNDER RULE 625 (Filed January 21, 1982)

78192

(96)

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VICTOR M. EISENBEISS, JR.	:	
Plaintiff	:	
v.	:	Law No. 78,192
JAMES HUBERT JARRELL	:	
AND	:	
AVIS RENT A CAR SYSTEM, INC.	:	
Defendants	:	

FILED (FILM)

JAN 21 1982

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO REVISE UNDER RULE 625

1. Rule 625 a., Maryland Rules of Procedure.

For a period of thirdy days after the entry of a judgment, or thereafter pursuant to motion filed within such period, the court shall have revisory power and control over such judgment. After the expiration of such period the court shall have revisory power and control over such judgment, only in case of fraud, mistake or irregularity.

2. The power of the trial court to revise a judgment within the thirty day statutory period is beyond question. In fact, the rule merely restates in substance the rule at common law. Eliason v. Commissioner of Personnel, 230 Md. 56, 185 A.2d 390 (1962) and Mayer v. Gyro Transp. Sys., 263 Md. 518, 283 A.2d 608 (1971). Moreover, under Cramer v. Wildwood Development Company, 227 Md. 102, 175 A.2d 750 (1961), "the timely filing of a motion has the effect of extending the time within which the court may exercise its revisory power" Id. at 175 A.2d 753. Also see Brilley v. Pinkston, 215 Md. 417, 136 A.2d 563 (1958).

Respectfully Submitted,

Van S. Powers
Attorney for Plaintiff
4344 Farragut Street
Hyattsville, Maryland 20781
277-3311

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of January, 1982, a copy of the foregoing Memorandum of Points and Authorities in Support of Motion to Revise Under Rule 625 was mailed postage prepaid to:

1. Francis X. Quinn, Esquire
   25 Wood Lane
   Rockville, Maryland 20850;

2. John E. Beckman, Jr., Esquire
   7676 New Hampshire Avenue
   Langley Park, Maryland 20783;

3. William N. Zifchak, Esquire
   P.O. Box 550
   Upper Marlboro, Maryland 20772; and

4. Henry Weil, Esquire
   Harvey Jacobs, Esquire
   One Central Plaza, No. 105
   11300 Rockville Pike
   Rockville, Maryland 20850

FILM

Van S. Powers

MOTION TO STAY THE EFFECT OF ORDER OF COURT OF DECEMBER 24, 1982 (January 21, 1982)

78192

(98)

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VICTOR M. EISENBEISS, JR.	:	
Plaintiff	:	FILM
v.	:	Law No. 78,192
JAMES HUBERT JARRELL	:	FILED
AND	:	JAN 21 1982
AVIS RENT A CAR SYSTEM, INC.	:	CLERK OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MD.
Defendants	:	

MOTION TO STAY THE EFFECT OF ORDER OF COURT OF DECEMBER 24, 1981

Plaintiff, Victor M. Eisenbeiss, Jr., by and through his attorney and pursuant to appropriate Maryland Rules of Procedure, hereby moves the Court to stay the effect of the Order of Court of December 24, 1981, filed January 4, 1982, in these proceedings, and for reason states as follows:

1. Pursuant to Order of Court of December 24, 1981; filed January 4, 1982, in these proceedings, the plaintiff was ordered to endorse and negotiate a settlement draft tendered to his former counsel; to execute a general release in favor of the defendants; and further, to execute and file with the Court a Line marking Law Number 78,192 as Settled and Dismissed With Prejudice.

2. Plaintiff has retained new counsel in these proceedings and asserts several and various, legal and equitable claims and defenses which are substantial and which ought to be heard by the Court in the interests of justice.

3. Plaintiff, by and through his counsel, has filed motions in these proceedings relative to said claims and defenses.

4. If the effect of the Order of December 24, 1981, is not stayed pending hearing on said other motions filed in this case, then the running of the statute of limitations is not tolled in this matter.

6. It is of the utmost importance to Victor M. Eisenbeiss, Jr. to have consideration of these matters, due to the fact that his injuries are so severe and substantial that his underlying tort action is his only remedy to correct his substantial damages and losses.

7. Defendants would not be prejudiced as a result of the granting of this motion to stay the effect of the Order of December 24, 1981, pending hearing of other motions filed in these proceedings.

8. The interests of substantial justice would best be served by granting plaintiff's motion to stay the effect of the Order of December 24, 1981, pending hearing of other motions filed in these proceedings.

WHEREFORE, Victor M. Eisenbeiss, Jr. respectfully requests the Court to Stay the Effect of the Order of December 24, 1981, and further, Victor M. Eisenbeiss, Jr. respectfully requests a hearing on this matter as soon as is practical.

Respectfully Submitted,

Van S. Powers
Attorney for Plaintiff
4344 Farragut Street
Hyattsville, Maryland 20781
277-3311

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of January, 1982, a copy of the foregoing Motion to Stay The Effect of Order of Court of December 24, 1981 was mailed postage prepaid to:

1. Francis X. Quinn, Esquire
   25 Wood Lane
   Rockville, Maryland 20850;

2. John E. Beckman, Esquire
   7676 New Hampshire Avenue
   Langley Park, Maryland 20783

3. William N. Zifchak, Esquire
   P.O. Box 550
   Upper Marlboro, Maryland 20772; and

4. Henry Weil, Esquire
   Harvey Jacobs, Esquire
   One Central Plaza, No. 105 W.
   11300 Rockville Pike
   Rockville, Maryland 20852

Van S. Powers

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STAY EFFECT OF ORDER OF DECEMBER 24, 78192 1981 (Filed January 21, 1982)

(99)

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VICTOR M. EISENBEISS, JR.	:	
Plaintiff	:	
v.	:	Law No. 78,192
JAMES HUBERT JARRELL	:	FILED
AND	:	
AVIS RENT A CAR SYSTEM, INC.	:	JAN 21 1982
Defendants	:	CLERK CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MD.

FILM

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STAY EFFECT OF ORDER OF DECEMBER 24, 1981

1. Rule 625 a., Maryland Rules of Procedure.

> For a period of thirty days after the entry of a judgment, or thereafter pursuant to motion filed within such period, the court shall have revisory power and control over such judgment. After the expiration of such period the court shall have revisory power and control over such judgment, only in case of fraud, mistake or irregularity.

2. While this rule does not specifically speak of the trial court's power to stay the effect of judgment, that power is implicit and well recognized. Motions under Rule 625 a. are directed to the sound discretion of the court. Cromwell v. Ripley, 11 Md. App. 173, 273 A.2d 218 (1971), Eshelman Motors Corp. v. Scheftel, 231 Md. 300, 189 A.2d 818 (1962); and Eastgate Assocs. v. Apper, 34 Md. App. 384, 367 A.2d 82 (1977). Moreover, that discretion should be exercised liberally lest technicality triumph over justice. Weaver v. Realty Growth Investors, 38 Md. App. 78, 379 A.2d 193 (1977).

Although a motion filed under Rule 625 a. does not automatically stay the time for appeal, for example, Tiller v. Elfenbein, 205 Md. 14, 106 A.2d 42 (1954), the power of the court to enter such an order was recognized in

Hardy v. Metts, 282 Md. 1, 381 A.2d 683 (1978). Also see Hanley v. Stulman, 216 Md. 461, 141 A.2d 167 (1958).

Respectfully Submitted,

Van S. Powers
Attorney for Plaintiff
4344 Farragut Street
Hyattsville, Maryland 20781
277-3311

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of January, 1982 a copy of the foregoing Memorandum of Points and Authorities In Support of Motion to Stay Effect was mailed postage prepaid to:

1. Francis X. Quinn, Esquire
   25 Wood Lane
   Rockville, Maryland 20850;

2. John E. Beckman, Jr., Esquire
   7676 New Hampshire Avenue
   Langley Park, Maryland 20783;

3. William N. Zifchak, Esquire
   P.O. Box 550
   Upper Marlboro, Maryland 20772; and

4. Henry Weil, Esquire
   Harvey Jacobs, Esquire
   One Central Plaza, No. 105 W.
   11300 Rockville Pike
   Rockville, Maryland 20850

Van S. Powers

ORDER
(Filed February 4, 1982)

98A

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

78192

VICTOR M. EISENBEISS, JR. :
Plaintiff :
v. : Law No. 78,192
JAMES HUBERT JARRELL :
AND :
AVIS RENT A CAR SYSTEM, INC. :
Defendants :

FILED
FEB 4 1982
CLERK OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MD.

ORDER

Upon consideration of Plaintiff's Motion To Stay The Effect of Order of Court of December 24, 1981 and the response thereto, it is, this 22 day of January 1982, hereby

ORDERED that the effect of the Order of Court of December 24, 1981 be stayed, until the matter of reconsideration is heard by the ~~Circuit Court~~ Hearing Officer, the Honorable Jacob L. Levin, provided the matter is properly set by the assignment.

Joseph Mendelson
JUDGE, CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY,
MARYLAND

(84)
78192

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VICTOR M. EISENBEISS, JR. :
Plaintiff :
v. : Law No. 78,192
JAMES HUBERT JARRELL :
AND :
AVIS RENT A CAR SYSTEM, INC. :
Defendants :

FILED
JAN 21 1982
CLERK OF THE CIRCUIT COURT
PRINCE GEORGE'S COUNTY, MD.

ORDER OF APPEAL

Plaintiff, Victor M. Eisenbeiss, Jr., by and through his attorneys and pursuant to appropriate Maryland Rules of Procedure, does hereby notice and order the appeal of the Order of Court of December 24, 1981, filed January 4, 1982, in the above captioned matter, and states the following:

1. The said Order of Court is a final order granting defendant's motion to enforce settlement, and further, directing plaintiff to endorse and negotiate a settlement draft and execute a general release in favor of the defendants, among other things.

2. Plaintiff's Order of Appeal is filed within thirty (30) days of the final order appealed from.

3. Service of plaintiff's Order of Appeal is made in the manner prescribed by section c of Rule 306.

Respectfully Submitted,

Van S. Powers
Attorney for Plaintiff

Thomas F. Kennedy
Attorney for Plaintiff
4344 Farragut Street
Hyattsville, Maryland 20781
277-3311

APPENDIX (v)

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Amendment XIV, Section 1., Constitution of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

Amendment VII, Constitution of the United States

In Suits at common law, where the value in controversy shall exceed twenty

dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Article IV, Section 18, Constitution of Maryland

(a) The Court of Appeals from time to time shall make rules and regulations to revise the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations prescribed by the Court of Appeals of otherwise by law.

Article 23, Maryland Declaration of Rights

In the trial of all criminal cases, the jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.

The right of trial by jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five hundred dollars, shall be inviolably preserved. (1949, ch. 407, ratified Nov. 7, 1950; 1969, ch. 789, ratified Nov. 3, 1970; 1977, ch. 681, ratified Nov. 7, 1978).

Courts and Judicial Proceedings, Section 1-201(a)

(a) Court of Appeals - The power of the Court of Appeals to make rules and regulations to govern the practice and procedure and judicial administration

in that court and in the other courts of the State shall be liberally construed. Without intending to limit the comprehensive application of the term "practice and procedure," the term includes the forms of process; writs; pleadings; motions; parties; depositions; discovery; trials; judgments; new trials; provisional and final remedies; appeals; unification of practice and procedure in actions at law and suits in equity, so as to secure one form of civil action and procedure for both; and regulation of the form and method of taking and the admissibility of evidence in all cases, including criminal cases.

Courts and Judicial Proceedings, Section 3-402

This subtitle is remedial. Its purpose is to settle and afford relief from uncertainty and insecurity with respect

to rights, status, and other legal relations. It shall be liberally construed and administered. (An. Code 1957, art. 31A, Section 12; 1973, 1st Sp. Sess., ch. 2, Section 1).

Courts and Judicial Proceedings, Section 3-4-3

(a) In general. - Except for the District Court, a court of record within its jurisdiction may declare rights, status, and other legal relations whether or not further relief is or could be claimed. An action or proceeding is not open to objection on the ground that a declaratory judgment or decree is prayed for.

(b) Enumeration not exclusive. - The enumeration is Sections 3-406, 3-407, 3-408, and 4-408.1 does not limit or restrict the exercise of the general powers conferred in subsection (a) in any pro-

ceeding where declaratory relief is sought and in which a judgment or decree will terminate the controversy or remove an uncertainty. (An. Code 1957, art. 31A, Sections 1, 5; 1973, 1st Sp. Sess., ch. 2, Section 1; 1976, ch. 915 Section 4.)

Courts and Judicial Proceedings, Section 3-406

Any person interested under a deed, will, trust, land patent, written contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, administrative rule or regulation, contract, or franchise, may have determined any question of construction or validity arising under the rule or regulation, land patent, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it. (An. Code 1957, art 31A, Section 2; 1973, 1st Sp. Sess., ch.

2, Section 1; 1976, ch. 915, Section 4.)

Rule 342(a) - (c), Maryland Rules of Procedure

a. Contents-Generally.

A plea in bar, including a general issue plea, shall be in writing, unless made in open court, and shall comply with Rule 301 (Form and Contents).

b. General Issue Plea.

1. Contract-Form

In an action ex contractu it shall be sufficient for the general issue plea to recite "that the defendant never was indebted as alleged," or "that the defendant never promised as alleged," or both.

2. Tort-Form

In an action ex delicto it shall be sufficient for the general issue plea to recite "that the defendant did not commit the wrong alleged."

3. Scope

Under a general issue plea any matter in defense shall be admissible in evidence, except such matters as must be specially pleaded pursuant to section c of this Rule.

4. Plea May Amount to General Issue.

An objection to a special plea that it amounts to a general issue plea shall not be allowed.

c. Matters to be Pleaded Specially.

1. Action ex Contractu

The following matters of defense must be specially pleaded in an action ex contractu:

(a) Alien Enemy.

That the plaintiff is an alien enemy at the time suit is brought, or that the plaintiff was an alien enemy at the time the contract was made.

(b) Tender.

That the defendant before the issuing of the summons tendered to the plaintiff a sum of money in satisfaction of the plaintiff's demand.

(c) Discharge in Bankruptcy or Insolvency.

That the defendant obtained a discharge in bankruptcy or insolvency from the plaintiff's claim.

(d) Limitations.

That the plaintiff's action is barred by the statute of limitations.

(e) Pleas Puis Darrein Continuance.

Any defense on the merits arising after suit brought.

(f) Usury.

That the plaintiff's claim is affected by usury.

(g) Ultra Vires.

That the contract made was ultra vires.

(h) Denial of Partnership.

A denial of partnership of the parties alleged in the pleadings.

(i) Denial of Incorporation.

A denial of the incorporation of the corporation alleged in the pleadings.

(j) Denial of Execution of Written Instrument.

A denial of the execution of any written instrument alleged in the pleadings.

(k) Arbitration and Award.

That the original cause of action had been merged by arbitration into an award.

(l) Denial of Consideration.

A denial of the consideration for a contract under seal.

(m) Denial of Ownership of Motor Vehicle.

A denial of the ownership of any

motor vehicle alleged in the pleadings. (amended Sept. 15, 1961).

2. Action ex Delicto.

The following matters of defense must be specially pleaded in an action ex delicto:

(a) Limitations.

That the plaintiff's action is barred by the statute of limitations (except in an action of ejectment).

(b) Pleas Puis Darrein Continuance.

Any defense on the merits arising after suit brought.

(c) Denial of Partnership.

A denial of the partnership of the parties alleged in these pleadings.

(d) Denial of Incorporation.

A denial of the incorporation of a corporation alleged in the pleadings.

(e) Denial of Execution of Written Instrument.

A denial of the execution of any written instrument alleged in the pleadings.

(f) Denial of Ownership of Motor Vehicle.

A denial of the ownership of any motor vehicle alleged in the pleadings.

(g) Justification, Excuse, Discharge-Trespass.

All matters of justification, excuse or discharge where the action is for trespass to real or personal property or to the person.

(h) Truth-Libel-Slander

Truth by way of justification in an action for libel or slander.

(i) Property in Defendant or Third Person.

That the property in the goods sought to be recovered is in the defendant or a third party.

Rule 552a, Maryland Rules of Procedure

a. Motion for - Grounds to be Stated.

In an action tried by a jury any party may move, at the close of the evidence offered by an opponent or at the close of all of the evidence, for a directed verdict in his favor on any or all of the issues. Such motion shall state the grounds therefore. An objection on behalf of the adverse party to such motion shall be entered as of course.

Rule 563a, Maryland Rules of Procedure.

a. Motion

1. When to be Filed - 3 Days.

Where a motion for a directed verdict made by a party at the close of all the evidence is denied then (1) within three days after the reception of a verdict, such party may move to have the verdict and any judgment entered thereon set

aside and to have judgment entered in accordance with his motion for a directed verdict, or (2) if a verdict was not returned, such party, within three days after the jury has been discharged, may move for a judgment in accordance with his motion for a directed verdict.

Rule 610a, Maryland Rules of Procedure.

a. Motion for.

1. When and by Whom Made.

In an action, a party asserting a claim, whether an original claim, counterclaim, cross-claim, or third-party claim, or a party against whom a claim is asserted, may at any time make a motion for a summary judgment in his favor as to all or any part of the claim on the ground that there is no genuine dispute as to any material fact and that he is entitled to judgment as a matter of law.

2. Effect on Time for Pleading.

A motion for summary judgment does not affect the time for pleading unless the court orders otherwise.

3. Use of Affidavits.

The motion must be supported by affidavit when filed with the pleading asserting the claim or before the adverse party has filed his initial pleading to it; otherwise the motion may be made with or without supporting affidavits. Unless the court shall otherwise order for good cause shown, where the motion is required to be supported by affidavit and the opposing party desires to controvert any statement of fact therein, he must file an affidavit or deposition in support of his answer to the motion. Such affidavit or deposition shall be filed before or at the time of filing his initial

pleading unless the time for filing is extended pursuant to section a of Rule 309. The failure to file such opposing affidavit or deposition shall constitute an admission for purposes of the motions of all statements of fact in the affidavit of the moving party, but shall not constitute an admission that such motion or affidavit is legally sufficient. In all other cases the adverse party may file an opposing affidavit at or before the time of the hearing.

4. In Lieu of Hearing on Bill and Answer.

Cases formerly heard on bill and answer may be heard under this Rule.

Rule 1231, Canon of Judicial Ethics XIII.

Kinship or Influence - A judge should not act in a controversy in which a near relative is party, witness, or lawyer; he should not suffer his conduct to

justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position, or influence of any party or other person. He should not testify voluntarily as a character witness.

Rule 1231, Canon of Judicial Ethics XXIII

Inconsistent Obligations - A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions.

Rule 1231, Rules of Judicial Ethics, Rule 13.

A judge under the Canons and Rules shall mean a judge of the Court of Appeals, of the Court of Special Appeals, of the Circuit Court for the Counties,

of the Supreme Bench of Baltimore City, of the District Court, of the Orphans' Courts and all other judges elected or subject to election, and those appointed if the full term of the particular office is for not less than four years.

Rule 1231, Rules of Judicial Ethics, Rule 14

a. These Canons and Rules apply to each judge of the Court of Appeals, the Court of Special Appeals, the Circuit Courts for the Counties, the Supreme Bench of Baltimore City, the District Court and Orphans' Courts, who has not resigned, retired, or been removed from office.

b. These Canons and Rules apply to each judge of one of those courts who has resigned or retired, if he is subject to and approved for recall for temporary service under Article IV, Section 3A of the Constitution, except that:

(i) Canon XXIV (Business Promotions and Solicitations for Charity), Canon XXV (Personal Investments and Relations) - the first two paragraphs, Canon XXVI (Executorships and Trusteeships), Canon XXIX (Candidacy for Office), Canon XXX (Private Law Practice) - the last paragraph, Rules 4, 6, 8, 9 and 10 do not apply to any such former judge, and

(ii) Canon XXIII (Inconsistent Obligations), Canon XXVII (Partisan Politics), and Rule 3, except for its last clause, do apply to any such former judge, but only during a period during which he has been designated for temporary service.

c. Rule 8 applies to any judge of a court named in section a of this Rule, who has resigned or retired in any calendar year, with respect to the portion of that calendar year prior to his re-

signation or retirement.

APPENDIX (vi)

Authorities Relied Upon Below

Cases:

Agnew v. Bank of Gettysburg, 2 H&G. 478 (1828)

Attorney General v. Johnson, 282 Md. 274, 385 A.2d 57 (1978) app. dism. 99 S.CT. 60, 439 U.S. 805, 58 L. Ed. 2d 97

Beahm v. Shortall, 279 Md. 321, 368 A.2d 1005 (1977)

Bettum v. Montgomery Federal Savings and Loan Ass'n, 262 Md. 360, 277 A.2d 600 (1971)

Brock v Sorrell, 15 Md. App. 1, 288 A.2d 640 (1972)

Cherthof v. Weiskittel, 251 Md. 544, 248 A.2d 373 (1968)

Clark v. Elza, 286 Md. 208, 406 A.2d 922 (1979)

Conklin v. Schillinger, 255 Md. 50, 257 A.2d 187 (1969)

DiGrazia v. County Executive, 43 Md. App 580, 406 A.2d, 660 (1979), rev'd on other grounds, 288 Md. 437 A.2d 1191 (1980)

Fertitta v. Herdon, 175 Md. 560, 3 A.2d 502 (1939)

Forest Hill Permanent Bldg. Ass'n of Harford County v. Fisher, Md. 666, 118 A. 164 (1922)

Funger v. Mayor of Somerset, 244 Md. 141, 223 A.2d 168 (1966)

Grain Dealers Mutual Insurance Co. v. Buskirk, 241 Md. 58, 215 A.2d 467 (1965)

Holloway v. Chrysler Credit Corp., 251 Md. 65, 246 A.2d 265 (1968)

Hoover v. Williamson, 236 Md. 250, 203 A.2d 861 (1964)

Houston v. Lloyd's Consumer Acceptance Corp. 241 Md. 210, 215 A.2d 192 (1965)

Impala Platinum, Ltd. v. Impala Sales (U.S.A.), Inc. 283 Md. 296, 389 A.2d 887 (1978)

Kagel v. Tatten, 59 Md. 447 (1883)

Kinkaid v. Cessna, 49 Md. App. 18, 430 A.2d 88 (1981)

Knee v. Baltimore City Pass. Ry. Co., 87 Md. 623, 40 A. 890 (1898)

Krick v. Dougherty, 266 Md. 97, 291 A.2d 648 (1972)

Mass Transit Administration v. Miller, 271 Md. 256, 315 A.2d 772 (1974)

McCullough v. Franklin Coal Co., 21 Md. 256 (1863)

Merchant's Mtg. Co. v. Lubow, 275 Md. 208, 339 A.2d 664 (1975)

Metropolitan Mtg. Fund, Inc. v. Basiliko, 288 Md. 25, 415 A.2d 582 (1980)

Miller v. Michalek, 13 Md. App. 16, 281 A.2d 117 (1971)

Montgomery Ward & Co., v. McFarland, 21 Md. App. 501, 319 A.2d 824 (1974)

Peck v. Baltimore County, 286 Md. 386, 410 A.2d 7 (1979)

Pullman v. Ray, 201 Md. 268, 94 A.2d 266 (1953)

Robinson v. Heil, 128 Md. 645, 98 A. 195 (1916)

Stockton v. Fry, 4 Gill 406 (1846)

Thompson v. Giordano, 16 Md. App. 264 295 A.2d 881 (1972)

Vanhook v. Merchant's Mut. Ins. Co., 22 Md. App. 22, 321 A.2d 540 (1974)

Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1972)

Wheaton Lumber Co. v. Metz, 229 Md. 78, 181 A.2d 667 (1962)

Constitutional Provisions:

Amendment VII, *Constitution of the United* States

Article IV, Section 18, Constitution of Maryland

Article 23, Maryland Declaration of Rights

Statutes:

Courts and Judicial Proceedings, Section 1-210(a), Annotated Code of Maryland

Courts and Judicial Proceedings, Section 3-401 et seq., Annotated Code of Maryland

Rules:

Rule 12, Federal Rules of Civil Procedure

Maryland Rules of Procedure 320, 321, 322, 323, 342, 346, 406, 420, 422, 527, 532, 535, 552, 563, 567, 572, 610, 625, 871, 1071, 1231, Canon of Judicial Ethics, XIII and XXIII, Rules of Judicial Ethics, Rule 13 and 14.

Texts and Treatises:

47 Am. Jur. 2d 628 Jury Section 3

56 Am. Jur. 2d Motions, Rules, and Orders, Section 5

Black's Law Dictionary

CJS Accord and Satisfaction, *Sections 47-49*

CJS Compromise and Settlement Section 54

CJS Juries, Section 9

MLE Compromise and Settlement Section 2

MLE Juries, Section 34

Poe-Pleading (6th ed), Section 621

Poe-Practice (6th ed), Section 347 A

82-1929

In The

Supreme Court of the United States

October Term, 1982

VICTOR M. EISENBEISS, JR.,

Petitioner,

vs.

JAMES HUBERT JARRELL, et al.,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

SUPPLEMENTAL APPENDIX FOR PETITIONER

VAN S. POWERS
THOMAS F. KENNEDY
CHARLES J. GODDARD
Attorneys for Petitioner
4344 Farragut Street
Hyattsville, Maryland 20781
(301) 277-3311

8529
Lyts Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587 MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 221-0008

SUPPLEMENTAL APPENDIX OF
PETITION FOR WRIT OF CERTIORARI TO THE COURT
OF APPEALS OF MARYLAND

TABLE OF CONTENTS

APPENDIX A.

VICTOR M. EISENBEISS, JR.	:	IN THE
		COURT OF APPEALS
V.	:	OF MARYLAND
JAMES HUBERT JARRELL, et al.	:	Petition Docket No. 482
		September Term, 1982
		(No. 176, September Term, 1982 Court of Special Appeals)
		(Law No.: 78192)

ORDER

Upon consideration of the petition for writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: February 3rd, 1983.

APPENDIX B.

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 176

September Term, 1982

VICTOR M. EISENBEISS, JR.

v.

JAMES HUBERT JARRELL, et al.

Wilner
Garrity
Adkins,
JJ.

---

opinion by Wilner, J.

Filed: November 4, 1982

On November 4, 1977, appellant Eisenbeiss was involved in a motor vehicle collision with a truck driven by appellee Jarrell and owned by appellee Avis. On October 31, 1979, he sued Jarrell and Avis in the Circuit Court for Prince George's County to recover for the injuries suffered by him in the accident.

In his Declaration, appellant asked for damages of $1,000,000. After the customary pretrial discover, as a trial date was growing nigh, the matter was set in for settlement conferences before the court. The first such conference, before Judge Blackwell, was held on January 5, 1981. At the conference, appellant reduced his demand to $200,000 and appellees offered $37,500. Judge Blackwell evaluated the case at $100,000. Trial was then set for February 23, but, as Judge Blackwell noted in a court memorandum "[n]egotiations are continuing and a follow-up settlement conference is set for February 6, 1981...."

The parties met again on February 6, before Judge Woods. At that conference, according to the court's memorandum of it, "[t]he demand was lowered to $100,000. The offer has not been increased from $37,500.00, but indications are that they would offer $50,000.00 to $60,000.00. It is unacceptable to Plaintiff." Trial was still scheduled for February 23, but, on February 25, 1981, it was taken out of the assignment and rescheduled for March 1, 1982, a continuance of over one year.

The first recorded explanation for this unusual event came on August 31, 1981, when appellees filed in the proceeding a "Motion To Enforce Settlement." Appellees averred in their motion that

(1) As of February 20, 1981, appellant "through his counsel, had presented to the defendants, through their counsel, a demand of settlement in the amount of [$75,000] in return

for which [appellant] would execute a general release and [the case] would be marked as settled and dismissed with prejudice";

(2) On or about February 20, 1981, appellees, through counsel, "met the settlement demand and agreed to pay to plaintiff the sum of [$75,000]" and that appellant, "through his counsel, confirmed that the case was settled";

(3) Trial of the case was scheduled for February 23, 1981, but "[f]ollowing the agreement of the parties, all parties, through their respective counsel, released all witnesses who had previously been placed under subpoena";

(4) On or about February 22, appellant's counsel advised appellees' counsel that "[appellant] desired to proceed to trial notwithstanding the settlement of the case which had been reached two days before. Counsel for all parties were in agreement that a valid settlement had been effected and the case would not proceed to trial";

(5) On February 23, counsel and appellant met with Judge Jacob S. Levin to apprise the court of the recent events. "In the course of that chambers conference, counsel for all parties again reconfirmed the fact and terms of the agreed settlement, but [appellant[apprised counsel and the Court that he had changed his mind, and that the [$75,000] settlement, which he had previously authorized and had not, prior to acceptance, been withdrawn, was no longer enough." (Emphasis supplied); and

(6) Appellees tendered a draft of $75,000 and a proposed release but appellant refused to accept the draft, execute the release, and dismiss the case.

Upon these averments, appellees asked the court to order appellant to endorse the draft and to execute the release and the dismissal tendered to him.

Appellant, through new counsel, answered the

motion on September 14, 1981. His defense was "that he never authorized his attorneys... to settle the above referenced matter for the sum of $75,000.00 and that the Plaintiff herein never agreed to the sum of $75,000.00 as full and final settlement of his claim against the Defendants herein as alleged in their Motion to Enforce Settlement." Appellant made no objection in his answer to the procedural device of a motion to enforce the alleged settlement agreement, as opposed to a separate action for specific performance. Nor, at the hearing held on the motion was such a defense raised. Indeed, at one point, in response to a question from the court about the "mechanics" of the matter, appellant's counsel conceded: "I agree wholeheartedly with [appellees' counsel] that the Court certainly does have the authority here to enforce or to order an enforcement of the settlement agreement."

The court conducted an evidentiary hearing

on the motion on December 17, 1981. Appellant's former counsel (Mr. Weil) and appellees' counsel both testified and confirmed that a settlement agreement had been reached as alleged in the motion, and that appellant had simply changed his mind after the agreement had been made and the witnesses released. Mr. Weil stated unequivocally that he had received authority from his client to make the demand of $75,000.[1] Appellees counsel, in testifying about what occurred at the conference before Judge Levin, stated "as I recall it, [appellant] said that he had authorized Mr. Weil to accept, but now he didn't feel it was enough...."

---

1. Counsel averred his authority at least twice in his testimony. On recross examination, he stated:

"Q. Mr. Weil, concerning the $75,000, you have indicated, I believe in your prior testimony, that some point in time [appellant] had indicated that if he were able to get $75,000, you would settle the case, is that correct?

A. That's correct. He said that he authorized me to accept $75,000 in settlement."

Upon this testimony, the court found as fact that counsel had the requisite authority to settle the case for $75,000 and that an agreement had been reached to settle for that amount. Accordingly, on December 24, 1981, it issued an order directing appellant to accept the $75,000 and execute a release, failing which appellees could deposit the $75,000 with the court clerk and have the case dismissed with prejudice.

Appellant responded to the order on January 21, 1982, with (1) an order of appeal, (2) a motion for reconsideration, (3) a motion to strike the December 24 order, (4) a motion to revise that order, (5) a motion to stay the effect of the order, and (6) a motion to set the order aside. A hearing was requested on all the motions, Notwithstanding the extant order of appeal, the court, on January 22, issued an order staying "the effect" of the December 24 order until "the matter for reconsideration is heard by the Hearing Judge."

Such a hearing, on all the pending motions, was held on February 8, 1982, at which time the court denied all the motions. Not further order was entered, however, revoking the January 22 stay of the December 24 order, or otherwise reinstating that December order, and no further order of appeal was filed.

In this appeal taken, we suppose, from the magically reinstated December 24 order, appellant complains:

> "I. The enforcement of an alleged settlement agreement in the amount of $75,000.00 on motion by a party to a civil suit, when there was no written settlement agreement and the non-moving party a[ff]irmatively states that his attorney did not have express authority to compromise the claim for $75,000.00, violates Article 23 of Maryland's Declaration of Rights which guarantees that 'the right of trial by jury of all issues of fact in civil proceedings in the several courts of law in this State, where the amount in controversy exceeds the sum of Five Hundred Dollars, shall be inviolable preserved.'

* * *

II. The enforcement of an alleged settlement in the amount of $75,000.00 on motion by a party to a civil suit, , when there was no written settlement agreement and the non-moving party affirmatively states that his attorney did not have express authority to compromise the claim for $75,000.00, is improper because it does not conform with the requirements of the Maryland Rules of Procedure.

* * *

III. There was an error in the lower court when the trier of facts, sitting at a motion to enforce settlement hearing, ruled, based in part on the trier[']s prior knowledge of or contact with attorney witnesses who testified at the motion to enforce settlement proceeding.

IV. The affidavits of Beatrice E. Eisenbeiss and Victor M. Eisenbeiss, Jr. each of January 20, 1982, containing information important to the events surrounding the motion to enforce settlement hearing on December 17, 1981, are dispositive or material to the fact finding process of the lower court, with respect to the ruling by the lower court on the motion to enforce settlement.

V. The lower court, under Canon 13 of Rule 1231, had a duty or obligation to recuse itself from ruling on the motion to enforce settlement, when the lower court expressed what purported to be an apparent conflict with Rule 1231, Canon 13.

VI. A motion to enforce settlement is not an authorized procedure under the Maryland Rules of Procedure, or Maryland statutory or case law.

VII. The trial judge made a finding of fact which was dispositive of plaintiff's rights on the underlying tort, and in that the trial judge did so, the trial judge was bound to follow Rule 1231 Canon 13 as a trial rule, for the purposes of receiving evidence (testimony) and making rulings on that evidence."

Before addressing these various issues, we need to pause and consider a matter that appears to have been overlooked by the parties -- namely, the propriety of the court's January 22 order staying the effect of the December 24 order and the consequent validity of all proceedings in the circuit court occurring thereafter. The precise question is whether the court had any jurisdiction to enter the stay after an appeal to this Court had been noted.

Two basic, and intermeshing, principles are involved here: (1) A party has thirty days in which to note an appeal from a final judgment;

and once such an appeal is noted, as a general rule the trial court's jurisdiction over the matter is immediately suspended until the appeal is resolved; and (2) pursuant to Maryland Rule 625, a trial court has broad revisory power over its judgments for a period of thirty days. It is not uncommon for agrieved litigants to do what appellant did here; i.e., to seek both forms of relief by noting an appeal to us and requesting a striking or revision of the judgment by the trial court.

In Tiller v. Elfenbein, 205 Md. 14 (1954), the Court of Appeals recognized that the concurrent pursuit of both remedial forms would necessarily create a gray area in terms of the trial court's continuing authority, and it laid down the following rules in order to reconcile the conflict: (1) the filing of an appeal does not preclude the appellant from also seeking revision of the judgment in accordance with Maryland Rule

625; (2) nor does the filing of a motion for such revision extend the time for filing an appeal or preclude the mover from timely noting an appeal. However, (3) "unless the appeal is dismissed when the motion comes on for hearing, the appellant must elect between his motion and his appeal. If the appeal is dismissed before the hearing... the motion stands for hearing as though no appeal has been entered." 205 Md. at 21.[2]

It was implicit from Tiller that, if the appeal was not dismissed prior to the scheduled hearing on the motion, the trial court would have no authority to hear or act on the motion. That implication was made clear in Visnich v. Wash. Sub. San. Comm., 226 Md. 589 (1961), where, in discussing Tiller, the Court said, at p. 590.

---

2. That, indeed, is what occurred in Tiller, and thus the trial court was held to have had the jurisdiction to consider and act upon the motion for revision.

> "[W]e confirm our prior holdings to the effect that the trial court lacks authority to entertain a motion to revise a judgment if an appeal is pending, and further stated that unless the appeal is dismissed when the motion to revise the judgment appealed from comes on for hearing, the appellant must elect between his motion and his appeal."

See also Gilliam v. Moog Industries, 239 Md. 107, 112 (1965); Housing Equity Corp. v. Joyce , 265 Md. 570 (1972); McGinnis v. Rogers, 262 Md. 7100 (1971).

The January 22 order was an obvious attempt to circumvent the required election. The court no doubt supposed that if the operation or effect of the December 24 order were stayed, there would be no final judgment, and thus appellant could proceed with his motions for revision without having to worry about pursuing his appeal. Such a supposition would have been well-founded if the stay had been ordered before appellant's appeal had been noted. See Hancock v. Stull, 199 Md. 434 (1952); Hanley v. Sutlman, 216 Md. 461 (1958; Brown v. State, 237 Md. 492 (1965). See also

S. & G. Realty v. Woodmoor Reality, 255 Md. 684, 692 (1969):

> "The cases make clear that one in the posiiton of [appellant] must fish or cut bait. If he does not obtain a stay of the primary decree, he can appeal within thirty days of its date and still seek revision of the primary decree by the trial judge, provided that at the time the court acts on a timely motion for revision the appeal has been dismissed. ... Here the court acted on S. & G.'s petition for revision as S. & G. asked it to do and the court would have had no power to act had there been in effect when it did so an operative order of appeal." (Citations omitted; emphasis supplied.)

Once the appeal was noted, however, the court lost its authority to stay or suspend the operation or effect of the judgment. This is clear from what the Court of Appeals said in Bullock v. Director, 231 Md. 629, 633 (1963), and again in Lang v. Catterton, 267 Md. 268, 282 (1972):

> "An appeal to this Court from a nisi prius court does not necessarily stay all further proceedings in the trial court, nor does it strip said court of all power over the proceeding in which the appeal has been taken. The trial court may act with reference to matters not relating to the subject matter of, or affecting, the proceeding; make such

> orders and decrees as may be necessary for the protection and preservation of the subject matter of the appeal; and it may do anything that may be necessary for the presentation of the case in this Court, or in furtherance of the appeal. But, when an appeal is taken, it does affect the operation or execution of the order, judgment or decree from which the appeal is taken, and any matters embraced therein. After the appeal has been perfected, this Court is vested with the exclusive power and jurisdiction over the subject matter of the proceedings, and the authority and control of the lower court with reference thereto are suspended." (Emphasis supplied.)

Suspending or staying the "effect" of a final judgment after an appeal has been noted certainly affects "the subject matter of the proceedings." Such an order, if valid, would have the effect of divesting this Court of jurisdiction to entertain the appeal by annulling the finality of the judgment and thus would preclude and preserve the subject matter of the appeal, which the trial court is authorized to do, that kind of order only frustrates the appeal, which the court is clearly not authorized to do.

Accordingly, we conclude that the court had no authority to issue the order of January 22, and that such order was therefore a nullity. From this it follows that, as the appeal noted on January 21 remained extant, the trial court had no jurisdiction to act upon the spate of motions seeking revision of the December 24 judgment.

This brings us to the questions raised by appellant. Excising the rhetoric in them, it would appear that appellant is complaining about (1) the procedure employed to enforce the alleged settlement agreement, (2) the failure of the judge hearing the motion to recuse himself, and (3) the findings made by the court. None of the complaints has merit.

Questions I, II, and VI relate, at least in part, to the propriety of using a motion such as that filed by appellees to enforce an alleged settlement agreement. The simple answer to them is that appellant never made such a complaint to

the trial court, and he will not be heard to make it for the first time on appeal. Maryland Rule 1085; cf. Clark v. Elza, 286 Md. 208, 210, n. 1 (1979); Kinkaid v. Cessna, 49 Md.App. 18, 21, n. 3 (1981). See, moreover, Eastern Environ. v. Industrial Pk., 45 Md.App. 512 (1980).

Cleared of their rhetorical verbiage, Questions I and II also attack the critical factual findings made by the court -- that appellant authorized his attorney, Mr. Weil, to settle the case for $75,000, and that a settlement agreement for that amount was reached. Question IV, to some extent, also challenges those findings. The testimony of the two attorneys clearly supports the court's findings, however; and we therefore cannot say that they are clearly erroneous. Maryland Rule 1086.

Questions III, V, and VII suggest that Judge Levin, who heard and decided appellees' motion,

had some duty under Maryland Rule 1231 to recuse himself. Not only was no request made of the judge to take such action, but, from the facts presented by appellant, we see no reason whatever why he should have done so. The complaint, in our judgment, is frivolous.

JUDGMENT AFFIRMED:
APPELLANT TO PAY THE COSTS.

APPENDIX C.

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VICTOR M. EISENBEISS, JR.:

Plaintiff :

vs. :

: Law No.: 78,192

JAMES HUBERT JARRELL :
and
AVIS RENT A CAR SYSTEM, INC. :

Defendants :

ORDER

It is this 24th day of December, 1981,

ORDERED, that the Motion of defendants To Enforce Settlement is Granted, and it is further

ORDERED,

1) That plaintiff, Victor M. Eisenbeiss, Jr., endorse and negotiate a Seventy-Five Thousand ($75,000.00) Dollar settlement draft

tendered to him, through his counsel, and

2) That Victor M. Eisenbeiss, Jr., execute a general release in favor of James Hubert Jarrell and Avis Rent-A-Car System, Inc., which release will be tendered to Mr. Eisenbeiss, through his counsel,

3) That Victor M. Eisenbeiss, Jr., through his counsel, execute and file with the Court a Line marking Law Number 78,192 as Settled and Dismissed With Prejudice, and it is

FURTHER ORDERED, that in the event that plaintiff, Victor M. Eisenbeiss, Jr. fails to perform all of the foregoing acts set out above in paragraphs 1, 2 and 3 within fifteen (15) days of the date of this Order, then defendants shall file the sum of Seventy-Five Thousand ($75,000.00) Dollars with the Clerk of the Court in settlement of this case, and upon receipt of same, the case is to be entered as "Settled and Dismissed With Prejudice".

/s/ Jacob S. Levin
JACOB S. LEVIN, Judge
Circuit Court for Prince
George's County, Maryland

(THIS PAGE INTENTIONALLY LEFT BLANK)

2-1029

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VICTOR M. EISENBEISS, JR.,
Petitioner,

v.

JAMES HUBERT JARRELL, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

RAYMOND A. YOST,
FRANCIS X. QUINN,
1750 Pennsylvania Ave., N.W.,
Suite 1118,
Washington, D.C. 20006,
(301) 762-3303,
Attorneys for Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Table of Authorities Cont'd

RULES & REGULATIONS:

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VICTOR M. EISENBEISS, JR.,
Petitioner,

v.

JAMES HUBERT JARRELL, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

STATEMENT OF CASE

On October 31, 1979, the Petitioner, Victor M. Eisenbeiss, filed suit in the Circuit Court for Prince George's County, Maryland, against James Hubert Jarrell and Avis Rent-A-Car System, Inc. The claim was for personal injuries allegedly resulting from a motor vehicle accident involving Mr. Eisenbeiss and Mr. Jarrell, who was at the time operating a vehicle owned by Avis Rent-A-Car, Inc.

Prior to and during the course of the litigation, the parties, acting through counsel, attempted to settle the case. Finally, on February 20, 1981, three days before the scheduled trial date, the defendants accepted the plaintiff's settlement demand of Seventy-Five Thousand Dollars

($75,000.00). Accordingly, all parties released the witnesses who had previously been placed under subpoena for the scheduled trial.

Two days after the settlement agreement had been reached and confirmed, the plaintiff informed his counsel that he had changed his mind and would not honor the settlement. His counsel advised him, to no avail, that the settlement was valid and binding as a mutual agreement between the parties.

The very next day, that for which trial had been scheduled, the plaintiff and counsel for all parties appeared in the chambers of Judge Jacob S. Levin to apprise the Court of the developments of the preceding three days. Counsel for all parties reconfirmed the facts and terms of the agreed

settlement; the plaintiff, however, informed counsel and the Court that he had changed his mind and had decided that the Seventy-Five Thousand Dollar ($75,000.00) settlement, which he had previously authorized and which authorization had not, prior to acceptance, been withdrawn, was no longer enough.

Despite repeated attempts by the defendants to tender the settlement draft of Seventy-Five Thousand Dollars ($75,000.00), the plaintiff refused to accept the draft, to execute a release and to dismiss the case with prejudice. The jury trial on the matter was rescheduled for March 1, 1982.

On August 31, 1981, defendants filed a Motion to Enforce settlement. Plaintiff filed an Answer to that Motion and requested

a hearing on the Motion at the earliest possible date. Duirng this time the plaintiff retained new counsel and his earlier attorney withdrew his appearance.

On December 17, 1981 the hearing on defendants' Motion to Enforce Settlement took place before Judge Levin. Testimony was taken from the plaintiff and from the attorneys who had participated in the settlement. Judge Levin made factual findings that the settlement figure of Seventy-Five Thousand Dollars ($75,000.00) had been agreed to by the plaintiff and that the plaintiff had indeed authorized his then counsel to effect a settlement in that amount. In furtherance of these findings, Judge Levin granted the Motion to Enforce Settlement.

On January 21, 1982, plaintiff again noted a change of counsel and filed a series of motions in response to the Order enforcing settlement. Defendants opposed these several motions; the motions were given an oral hearing before Judge Levin on February 8, 1982, and all were denied.

Plaintiff subsequently appealed the Order granting defendant's Motion to Enforce Settlement. The issues he brought to Maryland's Court of Special Appeals were basically three: (1) Whether a Motion to Enforce Settlement is a legitimate procedure under Maryland law; (2) Whether Judge Levin should have recused himself from hearing the Motion to Enforce Settlement; (3) Whether Judge Levin's findings concerning the settlement were

adequately supported by the record.

Maryland's Court of Special Appeals devoted the major portion of its opinion to a procedural issue not raised by the parties and similarly not presented in the Petition for Certiorari before this Honorable Court. As to the three issues actually presented it, the Court dismissed them as follows:

(1) Propriety of Motion to Enforce Settlement -- since not raised below, the Court refused to consider the issue for the first time on appeal. The Court did, however, conclude its discussion of the issue with the following cite, "See, moreover, Eastern Environ. v. Industrial Park, 45 Md. App. 512 (1980)." Part of the holding of Eastern Environ. v. Industrial Park

is that "entry of a monetary judgment upon a motion to enforce a settlement agreement in the underlying legal action is properly within the jurisdiction of a law court." 45 Md. App. at 518. The deliberate reference by the Court of Special Appeals to that case clearly indicates that such a motion is a legitimate procedural device in the courts of Maryland.

(2) Recusal of Judge Levin -- The Court of Special Appeals again noted that no request for recusal had been made by the plaintiff below, and further stated that "from the facts presented by appellant, we see no reason whatever why [Judge Levin] should have done so. The complaint, in our judgment, is frivolous."

(3) Factual Findings of Judge Levin --

The Court of Special Appeals reviewed the record and concluded that the Court's findings were clearly supported by testimony in the record and therefore not "clearly erroneous," as would be required for reversal.

Consistent with its findings on the issues, the Court of Special Appeals affirmed the Order of the lower court which granted defendants' Motion to Enforce Settlement. Plaintiff then petitioned for a writ of certiorari to the Court of Appeals of Maryland. The petition was subsequently denied by Order of the Court of Appeals of Maryland on February 3, 1983.

On February 25, 1983, Petitioner and his counsel gave written consent for disbursement of the Seventy-Five Thousand

Dollars ($75,000.00) settlement fund which had been deposited in the Registry of the Circuit Court for Prince George's County, Maryland. Disbursement of said fund was subsequently made pursuant to a Court Order dated March 1, 1983.

ARGUMENT

The Petitioner has articulated four questions for which he asserts that certiorari should be granted by this Honorable Court. Each of these four questions was initially presented for review to Maryland's Court of Special Appeals. Each question received adequate consideration by and a rational and sound decision from the appellate body. Subsequently, each question was presented in a petition for certiorari before the Court of Appeals of

Maryland, and that Court found certiorari on the issues not warranted.

Respondents respectfully submit that the case before this Court and the four questions once again raised by Petitioner fail to present any substantial question of federal law or any other "special and important reasons" as are required by Rule 19 of the Rules of this Honorable Court for a grant of certiorari. As explained in the following argument, the facts and issues of this case are not novel; the decisions below were consistent with Maryland precedent and with case law from other jurisdictions; the arguments advanced by Petitioner neither account for nor distinguish the sound and consistent case law which accords with the decisions below in

this case. Hence, in no respect does the case at bar merit an exercise by this Court of its discretionary Writ of Certiorari.

Certiorari is a discretionary writ, the exercise of which is reserved for cases which present substantial reasons therefor. As stated by this Court in Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 and later quoted in Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, "...it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion

and authority between the circuit courts of appeal."

Petitioner has raised due process and equal protection questions on each of two issues in this case: whether the motion to enforce settlement is an acceptable procedural device for disposition by a trial judge, and whether the judge in this case should have recused himself from deciding the motion to enforce settlement.

Petitioner's challenge to the motion to enforce settlement overlooks precedent in the State of Maryland which is directly on point. The 1980 case of Eastern Environ. Endeavor v. Industrial Park Authority of Calvert County, 45 Md. App. 512, 413 A.2d 1355, squarely decided that "entry of a

monetary judgment upon a motion to enforce a settlement agreement in the underlying action is properly within the jurisdiction of the law court." Id. at 518. The opinion in Eastern Environ. Endeavor also cited two previous Maryland Appellate cases in which the validity of a trial court's enforcement of a settlement was assumed without question. In Chertkof v. Harry Weiskittel Co., 251 Md. 544, 248 A.2d 373 (1968), "[t]he Court apparently saw no difficulty with the entry of a money judgment based upon a settlement agreement between the parties." (citation omitted) Eastern Environ. Endeavor, supra, at 517. In Clark v. Elza, 286 Md. 208, 406 A.2d 922 (1979), the Court of Appeals of Maryland, "while not directly address-

ing the propriety of a motion to enforce a settlement agreement in an underlying legal action, 406 A.2d at 924 n.1, did hold that a settlement agreement is an executory accord and that a plaintiff in breach of the accord could not prosecute the underlying tort action." (citation omitted) Eastern Environ. Endeavor, supra, at 517.

Maryland's acceptance of the motion to enforce settlement also finds support in case law from other jurisdictions. In Warner v. Rossignol, 513 F.2d 678 (1st Cir. 1975) (cited in both Eastern Environ. Endeavor, supra, and Clark v. Elza, supra), the Court upheld a trial court's disposition of a motion to enforce settlement despite challenges to the merger of law

and equity and claims of right to a jury determination, both issues of which have been raised herein. The Court in Warner easily disposed of those issues as follows:

> [6,7] Plaintiff has claimed a jury trial on these matters. Accord and satisfaction is a traditional affirmative defense at law apparently requiring, if demanded, a jury determination of disputed material facts. (citations omitted) But this is not a case where the defending party raises a consummated accord and satisfaction in bar. Rather the defendant seeks to block plaintiff's continuation of an original action by asking the court to specifically enforce a settlement contract which plaintiff refuses to carry out. Specific performance is an equitable proceeding. Moreover, the agreement sought to be enforced arose out of negotiations between attorneys in the midst of a trial. A judge seems better suited to assess the reasonableness of parties' conduct

> under all circumstances. We hold it within the authority of a judge[2] sitting without jury to make the necessary findings of fact and rulings.

513 F.2d at 683-4, footnote omitted. The Warner decision was recently reaffirmed by the First Circuit in Dankese v. Defense Logistics Agency, 693 F.2d 13 (1st Cir. 1982). Citing both Warner and Autera v. Robinson, 136 U.S. App. D.C. 216, 419 F.2d 1197, 1200 n.10 (1969), the Court in Dankese concluded, "It is well established, therefore, that a trial court retains an inherent power to supervise and enforce settlement agreements entered into by parties to an action pending before the court." Dankese, supra, at 16.

The foregoing cases establish a solid basis for the decisions below in this case.

Petitioner, while failing to recognize the authority of these holdings, has at the same time failed to cite any case law to the contrary. His allegations of due process and equal protection violations are extremely generalized and lack any real factual support in the record. Clearly, the context of this case presents no constitutional deprivation and no unsettled issue of law in need of resolution by this Honorable Court.

Aside from the absence of a controversial or compelling issue of law in this case, certain circumstances herein render the issues raised particularly unfit or inappropriate for review. The first such circumstance, noted by the Court of Special Appeals below, is that Petitioner failed

to make timely objections at the trial stage of the proceedings. He filed an Opposition to the Motion to Enforce Settlement, as well as a Request for Hearing on same, but in said Opposition he neither objected to the procedural propriety of such a motion nor did he request a jury determination on the facts concerning the settlement. Rather, Petitioner participated fully in the hearing before Judge Levin on said motion. In failing to note timely objections to those issues, Plaintiff lost his right to appeal them. Maryland Rule 1085; Paltrow v. Paltrow, 37 Md. App. 191, 376 A.2d 1134 (1977), aff'd, 283 Md. 291, 388 A.2d 547 (1978).

Another circumstance which makes

further review in this case inappropriate is that on February 25, 1983, Petitioner and his counsel gave their written consent to disbursement of the Seventy-Five Thousant Dollar ($75,000.00) settlement sum which had previously been deposited in the Registry of the Circuit Court for Prince George's County, Maryland. The Consent Order, which was signed by Judge Levin of that Court on March 1, 1983, provided that the $75,000.00 was to be disbursed as follows:

1. Henry E. Weil, Esquire - $30,000.00.

2. Victor M. Eisenbeiss, Jr. - $22,884.47 plus 100% of accrued interest to date of disbursement.

3. Van S. Powers, Esquire - $22,115.53.

(See Appendix to this Brief). Although

Petitioner takes the position that his consent to disbursement was conditioned on a survival of his right to appeal the case, case law consistently holds that one who accepts the benefit of a judgment thereby loses his right to appeal same. Spanel v. Berkman, 171 F.2d 513, (7th Cir. 1948), cert. denied, 336 U.S. 968; In re Denney, 135 F.2d 184, (7th Cir. 1943), cert. denied, 320 U.S. 747, reh. denied, 320 U.S. 812; Finefrock v. Kenova, 37 F.2d 310 (4th Cir. 1930), and cases following. The fact of the Consent Order in this case, if not an absolute bar to further appeal, at least clouds any other issues in the case and makes it a less attractive vehicle for resolution of conflicting legal doctrines or declaration of judicial precedent.

The final circumstance which makes this an unattractive case for review is that Petitioner is challenging the opinion of a respected trial judge, as well as that of Maryland's two appellate tribunals, each of whom felt that Judge Levin bore no duty to recuse himself from hearing and deciding the Motion to Enforce Settlement. Judge Levin's own decision to hear the motion was deemed entirely proper by the Court of Special Appeals of Maryland, after a thorough and objective review of the record as a whole. The Court of Appeals of Maryland, when given the opportunity to review that determination on certiorari, declined to do so. In the interests of judicial finality and conservation of judicial resources, there is no reason why this Honorable Court

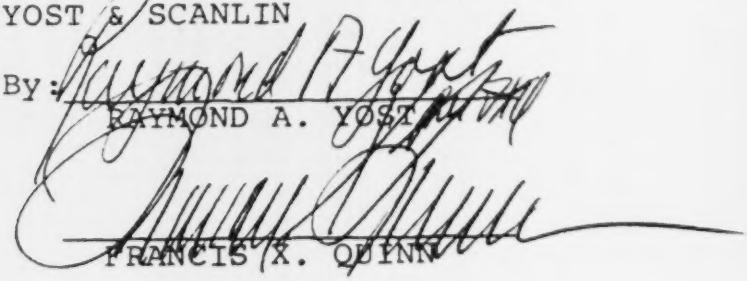
should review a charge of judicial bias which has already been objectively considered and rationally rejected by two appellate bodies.

CONCLUSION

In light of the foregoing arguments, Respondents respectfully submit that the issues raised by Petitioner do not warrant a grant of certiorari by this Honorable Court. There are no conflicting judicial doctrines at issue herein; Petitioner failed to adequately preserve for appeal several of the issues he is raising; each of the issues asserted has already received adequate review and a proper resolution; finally, Petitioner has already accepted the benefit of the settlement he is disputing. While any one of these reasons would alone justify a denial of certiorari,

their cumulative effect surely compels such a result. Accordingly, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

ANDERSON, QUINN, WYLAND,
YOST & SCANLIN

By: 
RAYMOND A. YOST

FRANCIS X. QUINN

Attorneys for
Respondents

In The

Circuit Court for Prince George's County, Maryland

Law No. 78192

Victor M. Eisenbeiss, Jr.
Plaintiff,

v.

James Hubert Jarrell, et al.,
Defendants.

CONSENT ORDER

(Filed March 1, 1983)

(Clerk of the Circuit Court for Prince George's County, Md.)

Upon consideration of the Petition to Withdraw Counsel Fees and Costs from the Registry of the Court and it appearing to the Court that the Court of Special Appeals of Maryland in an opinion filed November 4, 1982 has affirmed the findings of this Court that counsel, HENRY E. WEIL, had the requisite authority to settle the case for $75,000.00 and a petition for Writ of Certiorari to the Court of Appeals of Maryland having been denied, it is thereupon by and with the consent of the parties,

ORDERED, that the funds presently held in the Registry of this Court be, and the same are hereby to be, disbursed by the Clerk of this Court as follows:

1. *HENRY E. WEIL* — $30,000.00
2. *VICTOR M. EISENBEISS, JR.* — *$22,884.47* plus 100% of accrued interest to date of disbursement.
3. *VAN S. POWERS, ESQUIRE* — *$22,115.53.*

The disbursement of the above funds *in no way* affects the right of appeal to the Supreme Court of the United States by Victor M. Eisenbeiss, Jr. in these proceedings, and a trial, if granted by the Supreme Court of the United States, in these proceedings. Victor M. Eisenbeiss, Jr. does not concede, *in any way*, that, by the disbursement of the above funds that there was any agreement *whatsoever* between Victor M. Eisenbeiss, Jr. and Henry E. Weil to settle the above captioned matter at $75,000.00.

HENRY E. WEIL,
Petitioner,

VICTOR M. EISENBEISS, JR.,
February 25, 1983
Plaintiff,

VAN S. POWERS, ESQUIRE,
February 25, 1983,
Attorney for Plaintiff.

JACOB S. LEVIN,
Judge.

3/1/83

(Checked and Verified: McG)